

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
OCTOBER TERM, 1871, AT LOUIS.

G. W. DREYER, Appellant, *v.* ENNO SANDER *et al.*, Respondents.

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Appeal from St. Louis Circuit Court.

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by a recovery against Enno Sander & *Company*, as for money paid, laid out and expended for the use and benefit of that firm. Such recovery is sought upon the ground that the note, as the plaintiff avers, was drawn, indorsed and negotiated for the firm's benefit, the plaintiff being a mere accommodation indorser. He also avers that Sander informed him at the time his indorsement was obtained that his (Sander's) individual signature bound the firm. These averments were put in issue by the answer of Sander's copartners.

There was no evidence given at the trial which had any tendency to show that Sander was authorized to bind the firm by the use of his individual name in the execution of negotiable paper, unless such evidence is found in the eighth clause of the articles of copartnership entered into between Sander and his two associates. The plaintiff put these articles in evidence. The eighth clause reads as follows:

"8. None of the partners shall indorse notes or sign bonds individually, or in the name of the firm, or lend the money of the same, or sell out his share in the business, without the consent of the other partners, except Enno Sander, who, in his capacity of financier of the concern, shall provide for funds to carry on the business, and use his own judgment in obtaining them. He shall, however, be obliged to use his *individual name* alone for the purpose of procuring money by notes or otherwise, and shall thus be *individually liable* for all the debts contracted in such manner, and likewise be *individually* responsible for all losses which may occur in consequence of such indorsements. He shall have the privilege of retiring from the partnership before its termination, on certain conditions."

Now what is the fair construction of this article? Does it empower Sander to draw notes in his own name and thereby bind the firm? I think not. The note upon the face of it was Sander's note and not the note of the firm. (See *Boyle v. Skinner*, 19 Mo. 82; *Farmers' Bank of Missouri v. Hudgins*, 41 Mo. 574; and same case, 35 Mo. 428.) The intention of the eighth clause of the partnership contract above quoted evidently was to relieve the firm from the duty and responsibility of raising funds

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even for its own operations. Sander was to do that as between him and his associates, and to assume the sole responsibility of that branch of the business. He was not to use the credit of the firm in raising money either by signing paper in his own name or in the name of the firm. He was bound to use his own name and credit in raising funds, and was made "individually liable" therefor—that is, liable alone; and was "likewise to be individually [that is, alone] responsible for all losses" which might result from his financial operations. In a word, he was to be the capitalist of the concern, and furnish the money necessary to carry on its business, and to do so without involving the firm, except as the firm would be liable for the funds actually embarked in its affairs.

It was in evidence, and the evidence abundantly shows, that the money realized from the note in question did not go into the firm business, and that the firm had no connection with it. It was Sander's affair, and the money went to his benefit and not to the benefit of the firm. The evidence showing these facts went to disprove the averments of the petition, which affirmed an opposite condition of things. It was properly received, and the judgment will be affirmed. The other judges concur.

SUMRALL, TRUSTEE OF DOBYNS *et al.*, Appellants, v. EDWARD CHAFFIN AND ALBERT TODD, Respondents.

1. *Deed of trust—Advertisement under, what sufficiently accurate.*—An advertisement, under a deed of trust on a certain lot of ground, correctly recited the number of the lot, and further stated that the land was to be sold with all the improvements on it, but incorrectly stated the number of houses embraced in it. No attempt was made to show that any one was misled by the advertisement. *Held*, that the advertisement was sufficiently accurate.
2. *Deed of trust—Sale by trustee—Property should be sold in subdivisions, when.*—It would be the duty of a trustee, in selling a number of tenement houses standing together, to dispose of them singly or to sell the land in parcels less than the whole, if any one desired to purchase in that way, even though the houses were so built together with their walls that the property would not be readily susceptible of a division.

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Appeal from St. Louis Circuit Court.

Geo. P. Strong, for appellants.

J. N. Litton, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in equity to set aside a sale made by a trustee, and for an account of the rents and profits of the property sold.

The averments in the petition are, in substance, that on the 30th of May, 1859, Edward Dobyns and wife made a deed of trust to Albert Todd to secure the payment of \$5,000 loaned to Dobyns by defendant Chaffin, together with six interest notes for \$250 each; that the principal note was due in three years and the interest notes were payable semi-annually; that the property was subsequently conveyed to Sumrall, in trust, subject to the debt of Chaffin, which was a prior encumbrance; that Dobyns was the plaintiff's agent, attending to the payment of the interest notes; and that, being on the eve of departing from the city of St. Louis, where the property was situated, and the principal note being past due and some of the interest notes remaining unpaid, he went to the defendant Todd and made a contract with him, as trustee in the deed and agent of Chaffin, by which Todd agreed that no steps should be taken during Dobyn's absence, either to enforce said deed of trust or to collect the notes, except out of certain rents; that the conditions of the agreement with Todd were that Dobyns should turn over certain rents to him, yielding \$132 monthly, and amounting to \$1,584 per annum; that Dobyns complied with this agreement, and that the rents were sufficient to pay the taxes, interest, insurance, and part of the principal of the debt, but that Todd would not consent to place the balance to the credit of the principal, and it was therefore agreed that he should hold it in his hands for the plaintiff. It is alleged that, relying on this understanding and agreement, Dobyns left the city, and that Todd and Chaffin, by their conduct in receiving the rents and agreeing to apply and appropriate

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them, lulled Dobyns into security; and that, soon after he had left, Todd, in fraud of the plaintiff's rights, and in violation of the contract entered into, advertised and sold the property under the deed of trust, and purchased the same for Chaffin.

The defendants answered jointly, and substantially denying the allegations set out in the petition. They virtually say that Dobyns did not put any such amount of rents in the hands of Todd, and knew that he did not; that he pretended and professed to do so, but in this pretense and profession he was guilty of bad faith.

The cause was heard upon the pleadings, exhibits and proofs, and the court below dismissed the petition and awarded judgment for the defendants, and the plaintiffs have brought up the case for review by appeal.

A careful reading of all the proofs adduced and preserved in the record shows beyond all doubt that the evidence does not sustain the charges contained in the plaintiff's bill. When called upon to testify, Dobyns, who was the principal and only material witness for the plaintiff, wholly fails to show that there was any agreement made by Todd not to sell the property under the deed of trust and in his absence. He only says—and this is his strongest language—"I was satisfied, from what transpired, Mr. Todd would not sacrifice my property." He relied upon Mr. Todd's indulgence, but not upon any binding, positive contract. On the other hand, Mr. Todd is clear and explicit that no such arrangement or agreement was entered into. He agreed to take the rents, and had they been as represented they would have been satisfactory, and the sale would not have taken place. It was a matter of favor to Dobyns, but imposed no legal disability as to a foreclosure and sale of the property. The arrangement was made and concluded solely on the representation of Dobyns as to the condition of the property and the amount and certainty of the rents. But after Dobyns' departure it was found that his representations were wholly untrue. The property was turned over to Porter & Wolff, real estate and collecting agents, and the testimony shows that there were back taxes on the property, that the tenants had been garnished, and that up to July 22d, the

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date of the sale, nearly two months having elapsed, they had only been able to collect \$57; that up to October 1st they only received \$297, and part of this was paid out on judgments against Dobyns. Under these circumstances, when the principal debt, with the accumulation of one year's interest, was due, and some of the interest notes remained unpaid, it is not strange that Todd deemed the rents an inadequate security. He was acting for a principal who was a non-resident, and who relied upon him exclusively to protect his interest. When, therefore, instead of receiving the \$132 a month which Dobyns assured him he would get, he got only the small amounts above stated, he considered that he was deceived, and was under no further obligation to desist from selling and securing his debt.

Dobyns may have been too sanguine in his estimates, and may have inadvertently neglected to state the real condition in which the property was placed; but the fact is patent that his statement amounted to a misrepresentation. The property was forfeited for the non-payment of taxes; back taxes were due, amounting to over \$500, and the rents did not yield the sum supposed. When Dobyns represented that the rent of the houses would realize \$132 a month, or \$1,584 a year—a sum amply sufficient to keep down insurance, taxes and interest—and would yield a balance over, Todd said if that was the case it would be satisfactory. But it turned out not to be true, and hence there was neither a legal nor moral obligation binding on Todd.

A point has been made in regard to a misdescription in the advertisement, which it is argued operated injuriously toward the debtor. But in this assumption we cannot concur. The ground sold was a lot with certain tenement houses on it. The number of houses was not correctly stated in the advertisement; but the description was given correctly as to the lot, just as it was contained in the deed of trust, and it was further stated that the lot was to be sold with all improvements on it. This I think was entirely sufficient. There was no necessity for any other description than that inserted in the deed; and it is safe to suppose that bidders, when they desire to purchase property, and the advertisement informs them what property it is, will always inform them-

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selves as to its condition. Besides, it is not attempted to be shown that any injury resulted from the advertisement. Had any one been misled by it, a wholly different question would be presented.

It is also contended that the trustee unwisely and unsoundly exercised his discretion in selling the trust property in gross, when it should have been divided, but there is no evidence of this; in fact, the proofs are to the contrary. The weight of evidence goes to show that these tenement houses were so built together with their walls that the property was not readily susceptible of division. Still, we think that if there was any one who desired to purchase one of these houses, or a strip of land less than the whole, it would have been the duty of the trustee to have sold in that way; for the trustee is bound to realize the most he can for the debtor. But the evidence here vindicates the action of the trustee most conclusively. It shows that he attempted to sell the property by parcels and subdivisions; that he distinctly stated at the commencement of the sale that if any one wished to purchase a piece or lot it would be so set up, and he could have the opportunity. And after an ineffectual attempt to sell in that way, in consequence of there being no bidders, the property was then sold altogether. The sale seems to have been conducted with perfect fairness, and we fail to see any reason for disturbing it.

Some other matters were discussed in the argument of this cause, but we deem it unnecessary to notice them. They are not materially important, and can have no influence upon the final decision. In our view the judgment of the lower court must be affirmed. The other judges concur.

SAMUEL W. BUCKNER, Plaintiff in Error, v. PAUL STINE AND
ELIZABETH STINE, Defendants in Error.

1. *Equity—Title bond—Deed of trust, sale under after death of grantor—Purchase at by wife—Equity of wife, etc.*—B. gave to M. a title bond to certain land, and the wife of M., from her own estate, made partial payment of the purchase money, and added valuable improvements to the land. Afterward M. gave B. a trust deed on his equity in the property to secure the payment of the balance of the purchase money, remainder over to his wife. After M.'s death the lots were sold under the deed of trust to satisfy the unpaid notes, and most of them were bid in by the wife for herself, with her own means, at a price sufficient to pay the notes. B. then executed a deed for the whole to the heirs of M. Suit was brought against the widow by the purchaser at the administrator's sale of the interest of M. in the property, for the title thereto. *Held*, that it was properly dismissed, because, first, if the deed from B. conveyed his title it went to the heirs of M., and the judgment against the widow could only cut off her equity; second, as against her there was no equity. All the money that went for the purchase and improvement of the property belonged to her; and when M. conveyed his equity in trust for the payment of the purchase money, remainder to his wife, it was not a settlement in fraud of creditors, but a simple act of justice, and did not create a resulting trust in their favor.
2. *Assignment—Fraud cannot be inferred from merely because assignor was in debt.*—Fraud cannot be inferred from the transfer of property merely because the maker of the deed was at the time in debt.

Error to Louisiana Court of Common Pleas.

D. P. Dyer, for plaintiff in error.

I. The deed of Mendenhall was fraudulent and void as to those who were his creditors at its date.

II. The sale by the administrator to the plaintiff conveyed all the interest of Amos Mendenhall, and the deed by Block to the "heirs and legal representatives of Amos Mendenhall, deceased," inured to the benefit of the plaintiff, and vested in him the legal title, subject to the dower interest of defendant Elizabeth Stine.

III. All the equities are in favor of the plaintiff, who purchased at the administrator's sale, and it makes no difference whether the defendant Elizabeth or her former husband, Mendenhall, paid for the property.

Fagg & Johnston, for defendants in error.

I. The prayer of the petition embraces two separate and distinct actions that cannot be tried together. The manner of proceeding in the assignment of dower is altogether different from, and can not be joined with, a proceeding for the decree of title.

II. Upon the facts stated in the pleadings there could be no decree of title to the plaintiff, because the proper parties were not before the court. In such a proceeding the children of Mendenhall should have been made parties to the bill and properly brought into court.

III. There is no equity whatever in the bill. All the money paid and all the improvements made on the property were at the expense of Mrs. Mendenhall. The conveyance made by Block afterward to the heirs and legal representatives of Mendenhall inured to her benefit, and invested her with a complete title to so much of the property as was sold by the trustee. The remaining part of the property, as against this plaintiff, under the conveyance from Block, passed to Mrs. Stine, late Mrs. Mendenhall, and the children of Mendenhall by her.

BLISS, Judge, delivered the opinion of the court.

The plaintiff purchased at administrator's sale the interest of Amos Mendenhall, deceased, in certain real estate in the town of Louisiana, and filed his petition against Elizabeth Stine, formerly the widow of said Amos, and against her present husband, for a title to said land, and for an assignment to her of her dower interest in the same.

It appears that one Block had given to said Amos, while living, a title bond to the land for the price of \$250; and that his wife, the said Elizabeth, from her own estate, paid upon it the sum of \$50, and made valuable improvements upon the lots. Afterward said Amos, being indebted to sundry persons, executed a trust deed of all the lots to secure said Block for the remainder of the purchase money and another small debt, remainder to his wife. The lots were offered for sale under the trust deed after Mendenhall's death, and the said Elizabeth bid most of them in

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for herself, with her own means, and at a price sufficient to pay the debts it was given to secure, and said Block executed a deed for the whole to the "heirs, etc., of Amos Mendenhall."

The proceeding was treated as instituted for title to the land, and was properly dismissed; and,

First, for want of parties. If the deed from Block conveyed his title, it went to the heirs of Mendenhall, and a judgment against the widow could only cut off her equity.

Second, as against her there is no equity. Every dollar that went for the purchase and improvement of the property belonged to her, and the evidence shows that the family were principally dependent upon her industry and means for support. Her husband was thriftless and improvident, and when he conveyed his equity in trust for the payment of the purchase money, remainder to her, it was not a settlement, a gratuity in fraud of creditors, but a simple act of justice, and it did not create a resulting trust in their favor, the benefit of which could pass by the administrator's sale.

It is unnecessary to consider whether a sale of such an interest of deceased as the plaintiff claims to have purchased, even if the trust deed were fraudulent, would pass anything or not. In the case at bar no actual fraud is shown, and as matter of law it cannot be inferred from a transfer under the circumstances merely because Mendenhall was in debt.

The judgment will be affirmed. Judge Currier concurs. Judge Wagner absent.

H. R. BATES, Defendant in Error, v. JOHN W. MILLER *et al.*,
Plaintiffs in Error.

1. *Mortgages and deeds of trust — Suit for foreclosure — Party coming in and defending against claim for debt must show his interest — Construction of statute.*—Where, in a suit to foreclose a mortgage, parties are let in to defend under a *prima facie* title, and, in accordance with the provisions of section 7 of the act touching mortgages (Wagn. Stat. 955), answer in bar of the debt secured by the mortgage, their interest in the property encumbered may be put in issue by the pleadings. The requirement to set up their interest

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is implied from the terms of that section which permit him to become a party at all.

When the mortgage was in fact satisfied, their interest could not be impeached in a direct proceeding by them to avail themselves of their title. In such case the mortgagee would be an intermeddler as between them and others, and would have no interest of his own to protect.

Error to Sixth District Court.

Crews, Letcher & Laurie, for plaintiffs in error.

I. Maupin & King proved conclusively, and the court in its decision admits the fact, that the debt which Bates claimed to be assigned was fully paid and extinguished; and further, that the sheriff's deed, regular and formal on its face, was *prima facie* evidence of title in Maupin & King.

II. The sheriff's deed, perfectly regular and formal on its face, shows a strict compliance with every requirement of the statute. Could its validity and correctness be thus collaterally questioned? (*Landis v. Perkins*, 12 Mo. 238; *Reid v. Heirs of Austin*, 9 Mo. 722.)

Dryden & Dryden, for defendant in error.

These plaintiffs were admitted in the case upon the theory that they had an interest in the land sought to be affected by the suit, to be protected and defended. But when their theory was shown to be without foundation, any further interference became mere impertinent intermeddling.

BLISS, Judge, delivered the opinion of the court.

The plaintiff files his petition to foreclose a mortgage executed by defendant Miller. Maupin & King, upon their own motion, are made parties, and answer, setting out their interest in the premises as purchasers at sheriff's sale, and alleging a satisfaction of the mortgage. Miller makes default. The reply denies the interest of Maupin & King and denies satisfaction. Upon the trial the default was taken as to Miller, and Maupin & King offered the sheriff's deed to show their interest, and also evidence

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to show the satisfaction; and the plaintiff, to rebut, showed that the execution sale at which they purchased was made under a special execution, a *venditioni exponas*, which did not order the sale of this property, and which contained no order to make a farther levy. Under this evidence the court held that Maupin & King had no interest in the property, and no right to make defense, and gave judgment against Miller and an order to sell the property.

There is no doubt in regard to the interest of Maupin & King. The sale at which they purchased was simply void, and they took nothing by their deed. (Maupin v. Emmons, 47 Mo. 304.) But the question arises whether, having been properly let in to defend under a *prima facie* title, and having answered in bar of the debt, their interest can be put in issue. The issues were made up on the supposition that this could be done. The answer of Maupin & King sets forth their interest in detail, and asks for affirmative relief. They style their answer an interplea, and offer evidence to show their interest and their right to the relief sought. They evidently supposed that this was a material part of their case, and considered the proceedings analogous to an interplea in attachment. If their view was correct, then the question of interest was material and issuable, and its decision against them would turn them out of court. If otherwise, if the question of interest is no longer to be considered, then the allegations of the answer in regard to it might have been treated as surplusage and the hearing been had upon the matter in bar.

The language of the statute is somewhat ambiguous, and the subject is not without difficulty. "Any person claiming an interest in the mortgaged property may, on motion, be made defendant to any such proceedings, and may answer in avoidance or bar of the deed, or debt, or damages, and issue shall be made and tried as in other civil suits." (Wagn. Stat. 955.) This might imply that any person claiming an interest or showing an apparent interest may become a party, and, when made so, may make any defense upon the merits. In that view the question of interest or the right to be made a party is decided upon the motion, and cannot be put in issue by the pleadings. The objec-

tion to this view is that strangers might be let in to interfere in matters that do not concern them. It might be easy to make the claim to show a *prima facie* interest when really there is none whatever; and yet, when let in, the fact that they have nothing to protect cannot be shown, and they may intermeddle and make defenses against the will of the real parties in interest. The other view apparently interpolates the statute and requires the new party to set up his interest, as well as authorizes him to answer to the merits. And yet would it be an interpolation? Is not the requirement to do so implied from the fact that he has become a party, and, having become so, must show his title? For what else is he made a party but to protect his interest? This is a statutory proceeding analogous to a bill of foreclosure, to which persons not original parties may become so, and the permission to make an issue upon the merits should not dispense with the obligation to show the right to be there at all. The practice, then, adopted by the parties in the case at bar is the better one, *i. e.* for any one claiming an interest to be permitted to answer, setting it up, and making the defenses spoken of in the statute. If the interest so set up be denied, its consideration is necessarily involved, and, if not found to be real, the intruding party should not be permitted to make defenses for others.

It is said that the plaintiff, if his mortgage is satisfied, has no right to impeach the title of Maupin & King. Certainly not in a proceeding by them to avail themselves of their title. He would be an intermeddler as between them and others, and would have no interest of his own to protect, and would not be permitted to protect that of persons who are strangers to him.

This view is consistent with the reasoning of Judge Napton in *Wall v. Nay*, 30 Mo. 494, although the question there considered is not the same as the present one; and being the view held by the court below, the judgment will be affirmed. The other judges concur.

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STATE OF MISSOURI, TO USE OF JAMES SHIELDS, ADMINISTRATOR
OF MARGARET WISHART, DECEASED, Defendant in Error, v.
MICHAEL FLYNN, Plaintiff in Error.

1. *Administrator's failure to pay over funds of an estate — Suit for may be brought before final settlement by County Court, when —* Suit on the bond of a public administrator, alleging his failure, or that of his legal representatives, to pay over to his successor the funds of a trust estate in his hands, as required by law (Wagn. Stat. 77, § 47), and charging the conversion and appropriation thereof to his own use, may be maintained before final settlement of the estate by the County Court.

Error to Second District Court.

Van Allen, for plaintiff in error.

I. Plaintiff in his petition does not bring himself within the provisions of sections 46-8, p. 77, of Wagner's Statutes. He does not aver that French's legal representatives were ever cited by the County Court to make "final settlement" of money, property, etc., of the estate of Wishart. (*Gamble v. Hamilton*, 7 Mo. 469; *State, to use of Darland, etc., v. Porter*, 9 Mo. 356) There the alleged delinquent failed to comply with an order of the County Court duly served upon him — not, as in this case, an order "duly entered of record" only.

II. The plaintiff avers that defendant wholly failed and neglected to account for \$1,013.34. Account how, and to whom? There was no account due from him at the time he died; not one year had elapsed since he took charge of said estate. (Wagn. Stat. 107, § 2.

III. This court, in the case of *State, to use of Darland, v. Porter*, *supra*, in the opinion, seem to have overlooked the provision in the statute giving to County Courts exclusive, original jurisdiction, as that point is not cited in the briefs of counsel or referred to by the court. In the case of *Overton v. McFarland*, 15 Mo. 312, the question was examined, and the decision of this court in the case of *Miller v. Woodward*, 8 Mo. 169, approved. But, says the plaintiff, French failed to account. It is true he died before an account was due; still the bond makes no excep-

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tion in case of death, and therefore his sureties are liable. Bonds are common wherein sureties bind themselves that a person charged with some criminal offense will appear at the next court having criminal jurisdiction, and not depart without leave. Was it ever claimed that, where the principal in the bond died before that time, his sureties were liable for his non-appearance? Most assuredly not. And the County Court is certainly clothed with ample power to compel the legal representatives of a deceased administrator to "account for all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind of the deceased, at such times as the court shall order, on final settlement." (Wagn. Stat., ch. 2, art. 1, § 47.) And for that purpose the said court is clothed with "exclusive, original jurisdiction." It is true that the section provides that "the succeeding administrator," etc., "may proceed at law against the delinquent and his sureties." Has the County Court in this case decided that French was delinquent? There is no such averment in the plaintiff's petition in this case. It is to be inferred from the petition that the administration of French upon the Wishart estate is still an open, unsettled administration, and the Circuit Court had no jurisdiction. (*Overton v. McFarland*, 15 Mo. 312.)

Conger & Reynolds, for defendant in error.

I. An allegation of final settlement by the principal in the bond, or his legal representatives, need not be made, for it is not necessary to wait for such settlement. (Gen. Stat. 1865, ch. 120, § 47; *id.* ch. 126, § 9; *id.* 120, § 48.) True, section 47, chapter 120, refers to a final settlement; but this has been adjudged merely directory. (*State, to use of Darland, v. Porter et al.*, 9 Mo. 356; *Finney v. State*, 9 Mo. 362.) These decisions were made under the law of 1835; but that law was similar, in fact almost word for word, to our present statute.

II. The petition shows an order by the County Court on French's administrators, directing them to turn over all assets.

III. The action is not against French's administrators or legal representatives for a conversion by them, but against his own

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sureties, for his own unlawful acts during his own lifetime. Of course, if French made the conversion during his lifetime, the effects converted would not come into his administrator's hands. All the connection his administrators or legal representatives had with the matter was the necessary allegation that neither he (French) in his lifetime, nor his administrators or legal representatives for him since his death, ever paid over or accounted for the amount converted by him. (Hay's Adm'r v. Petticrew's Adm'r, 19 Mo. 373.) And on this account the case of Gamble's Adm'r v. Hamilton *et al.*, 7 Mo. 469, cited by plaintiff in error, is not in point. That case was an action for the recovery of property in the hands of the legal representatives of the deceased administrator, which could be identified in their hands; while this is for property—assets—converted by the administrator himself.

IV. The petition in this case is in strict conformity to those heretofore cited by our courts with approval. The cases of *The State, etc., v. Porter et al.*, *supra*; *State v. Finney et al.*, 9 Mo. 632; *Hay's Adm'r v. Petticrew's Adm'r*, 19 Mo. 373; *The People v. Dunlap*, 13 Johns. 437, are parallel, and in most of them the same objections raised by counsel for the plaintiff in error were raised and were overruled by the court.

WAGNER, Judge, delivered the opinion of the court.

This was an action against the defendant as surety on an administrator's bond. From the record it appears that in March, 1867, George R. French was appointed public administrator of Washington county; that he executed his bond in the sum of \$10,000, in the usual form, with defendant as one of the sureties. In September of the same year, as public administrator, he took charge of the estate of Margaret Ann Wishart, and proceeded to administer upon it. French died in 1868 without having finished the administration of Wishart's estate, and Shields was elected his successor and was ordered to take charge of the estate. Letters of administration were also taken out on French's estate, and his administrators were ordered to turn over everything belonging to the Wishart estate that had come to their hands, to Shields.

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The petition alleges that French received \$1,336.61 of property, money, etc., belonging to the estate of Wishart, and that he converted of the same to his own use the sum of \$1,013.32. This conversion is assigned as a breach of the condition of the bond, and damages are asked in that amount.

The Circuit Court sustained a demurrer to the petition, but the ruling of the Circuit Court was reversed in the District Court. The essential points relied on to sustain the demurrer are, that it is not averred that French or his legal representatives made final settlement of the Wishart estate before the commencement of the suit; that it is not stated that the County Court made final settlement of the estate, or that they made an order on French's legal representatives to pay over the property on final settlement with them.

The statute provides that if any executor or administrator die, resign, or his letters be revoked, he or his legal representatives shall account for, pay and deliver to his successor, or to the surviving or remaining executor or administrator, all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind of the deceased, at such times and in such manner, as the court shall order on final settlement with such executor or administrator or his legal representatives. And it is also provided that the succeeding administrator, or the remaining executor or administrator, may proceed at law against the delinquent and his sureties, or either of them, or against any other person possessed of any part of the estate. (Wagn. Stat. 77, §§ 47-8.)

The only question material to be considered is whether an action on the bond can be maintained, under the circumstances of this case, before final settlement made by the County Court. This is not a new question in this court. It has been heretofore presented and decided in the affirmative. The case of *The State, to use of Darland, Adm'r, etc., v. Porter et al.*, 9 Mo. 356, arose under the statutes of 1835, but the provisions of the law then were similar to those now in force. The case is therefore direct authority. It was there held that the section which declared that whenever an order of payment was made on final settlement and

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the order was not complied with, suit should be brought, was not intended to be restrictive, nor did it convey the idea that suit could be brought only in those cases in which there was a final settlement; but it was determined that the section which enacted that the succeeding or remaining executor or administrator might proceed at law against the delinquent and his sureties, gave a remedy under all and any circumstances against a former administrator. A similar action was brought in the case of *The State, to use of Renfro's Adm'r, v. Price et al.*, 17 Mo. 431, and the point was not raised either by the counsel or the court, but the proceeding was treated as the admitted and established law of this State. It was settled in a very early day in this State that an action on an administrator's bond might be instituted against a surety before any indebtedness had been previously established, or any judgment obtained against the administrator. (See *Devore v. Pitman*, 3 Mo. 179; *State, to use, etc., v. Campbell*, 10 Mo. 724; *Oldham v. Trimble*, 15 Mo. 225; *State, etc., v. Matson et al.*, 44 Mo. 305.)

Mr. Williams states the proposition of law, that a neglect or refusal to distribute until a previous decree or sentence, is not a breach within the meaning of the condition that the administrator should well and truly administer according to law. But he adds that when the administrator applies and converts to his own use the effects of the intestate, so that these effects are lost to the estate, that will amount to a breach of the condition of the bond and will authorize an action on the bond at the instance of those interested. (1 Wms. Ex'rs, 445.) In the present case a conversion and appropriation to his own use by French was expressly alleged and assigned as a breach of the condition of the bond. If the facts stated were true, the condition of the bond was undoubtedly broken, and a right of action accrued against the sureties. The defendant, therefore, should have made his defense by answer and not by demurrer.

The judgment of the District Court will be affirmed. The other judges concur.

STACY B. BARCROFT *et al.*, Appellants, *v.* GODFREY LESSIEUR
et al., Respondents.

1. *Deed of trust — Assignment — Must be signed by all, etc.*—Certain grantees in a deed of trust conveying real estate, in common with various other creditors of the grantor, signed an agreement releasing him from his indebtedness on his conveyance to them *pro rata* of certain portions of the land embraced in the deed of trust. Some of the grantees therein refused to sign the agreement. Those signing did so with the understanding that the remainder should join in it. *Held*, that the signers of the agreement did not thereby lose their rights under the deed of trust, first, because the grantor in the trust deed could pass no title to the land unless all the grantees entered into the agreement; second, because they were not bound by the agreement unless all signed it.

Appeal from New Madrid Circuit Court.

Lubke & Player, for appellants.

I. There was no condition attached to the agreement that all the creditors of Lessieur should sign it; and defendants have clearly shown by their action under it that they did not intend that its validity should depend upon the consent of all the creditors to it, secured by the deed of trust.

II. Plaintiffs are not the only persons who would be affected by setting aside the agreement. Lessieur entered into an agreement for a valuable consideration with defendants, which was partly executed by conveyance of lands; and his minor heirs, who are made defendants, have a right to the benefit of it.

III. If defendants ever had any rights to have the agreement set aside, they are guilty of such laches that a court of equity should refuse them relief. The evidence shows that the agreement has existed for twelve years, without any effort on their part to have it annulled. It is the universal doctrine of equity that no relief will be granted to a party who has been guilty of laches.

IV. The agreement by its terms provides that conveyances under it should be made by Lessieur, and it recognizes the existence of the deed of trust, showing that the creditors signing it had in mind the fact that Lessieur could only convey subject to the deed of trust, and that they were satisfied with such title as

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he could convey. The evidence shows that they had no right to expect that conveyances could be made free from the trust, because it shows that Caleb Cope & Co., creditors secured by the trust deed, never assented to the agreement; and although it tends to show that plaintiffs did at one time so assent, it also shows that, after plaintiffs had refused to sign, defendants went on to carry out the agreement and to receive conveyances, subject to the trust. Hence, defendants made a binding agreement with Lessieur, and voluntarily gave up their rights under the trust deed. The only right left to those of the defendants whose claims remain unsatisfied, either by payment of money or conveyances of property, is to have property appraised and conveyed to them, subject to the trust.

W. B. Napton, for respondents.

The deed of trust of 1856 put the title to the property conveyed out of Lessieur, the debtor, and unless the plaintiffs signed the second agreement it would not be executed. He had no title to convey. The very nature of the agreement of 1858 implies that all the creditors must sign or it would be worthless.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to enforce a deed of trust and to settle the rights of the beneficiaries under the deed. The case shows that one A. Adolphus Lessieur, in 1856, conveyed quite an amount of land in New Madrid county, in trust to secure debts then owing by him to various parties in Philadelphia. These debts matured in 1857, but no action appears to have been taken under the deed of trust prior to the institution of this suit in 1869.

It appears, however, that Lessieur and his Philadelphia creditors, in 1858, sought to make an assignment by which the deed of trust lands should be distributed among the creditors upon a valuation, each creditor taking land in satisfaction of his claim in lieu of money. A written agreement embodying that view and defining the mode of procedure was drawn up and submitted for execution. The creditors were made parties of the first part,

Lessieur party of the second part. But it does not appear that either the plaintiffs or Lessieur ever signed the document. The evidence shows that the plaintiffs agreed to do so, but that they never did. The other deed of trust creditors signed the agreement; but were they bound by it prior to its execution by Lessieur? And was any one of the creditors bound till all had joined in the execution of the instrument?

The theory of the plaintiffs is that the claims of the signing creditors were extinguished by the arrangement evidenced by the agreement and by subsequent action under it; that is, extinguished as regards any right under the deed of trust. The court is asked to so adjudge, and to order a sale of the deed of trust lands for the sole and exclusive benefit of the plaintiffs. The position of the plaintiffs is this: They insist that the debts of their co-beneficiaries have been satisfied by the acceptance or an agreement to accept a portion of the land included in the deed of trust. Then, treating these debts as paid, the plaintiffs seek to oust the creditors, agreeing to accept land, of all benefit of the land agreed to be taken, by a sale of it under this deed of trust for the plaintiffs' exclusive benefit.

This is a suit in equity, but it is difficult to see on what foundation of equity the desired decree could be based. The obvious fact is that the alleged agreement of 1858, in relation to the acceptance of land in lieu of money, was simply nugatory. It was not signed by Lessieur, and if it had been, the legal title to the land proposed to be conveyed was not in him. Any conveyance he might make was liable to be defeated at any time by an enforcement of the deed of trust, unless all the beneficiaries in the deed joined in and were bound by the contemplated arrangement. The plaintiffs defeated the arrangement by not becoming parties to it. The evidence shows that these parties who signed did so with the understanding that all the creditors named in the deed of trust were to join. That none were to be bound unless all joined is inferable from the nature of the agreement. That was the only way in which anything could be done prudently and effectually in the direction proposed. So long as the deed of trust remained in force as a security for

any of the creditors it was impossible for Lessieur to pass a title that could be depended upon.

There is nothing to show that it ever entered into the thought of any one of the creditors to cancel his rights under the deed of trust for a title so untrustworthy and insecure as would be a title from Lessieur while the deed of trust remained in force.

It is true that Lessieur, as shown by the New Madrid records of deeds, made deeds to three of the creditors, but beyond the fact of recording there is nothing to show that the grantees therein ever accepted these deeds. Whether these deeds were accepted or not, it is certain that they conveyed to the grantees no legal title, and no title, either legal or equitable, that was not subject to the deed of trust and exposed to total extinction.

The plaintiffs are now asking an order for the sale of these very lands to satisfy their demand. If the order is granted and the sale made, what becomes of the rights of the grantees under the deeds referred to? The only equitable road out of this entanglement is through orders vacating these deeds and directing a sale under the deed of trust, the proceeds to be applied *pro rata* in satisfaction of all the debts secured by the deed, so far as such proceeds may be adequate to that end. That was the view taken by the court below. Its decree to that effect I think should be sustained.

As we have seen, the plaintiffs refused to become parties to the agreement of December, 1868, after they had once assented to the proposed arrangement. Whether there was any fraud in this connection does not seem to be a matter of materiality. Their refusal to co-operate with the other creditors broke up the contemplated unity of action on the part of the beneficiaries under the deed of trust, and rendered it impossible for Lessieur to pass a good title under any deed he was competent to make; and a good title was what the creditors anticipated under the proposed arrangement, and what they contracted for, if the agreement in the state in which we find it can be regarded as a binding contract at all.

The view that has been taken of the case renders it unnecessary to review the action of the court upon the plaintiffs' objection to

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evidence. There was sufficient evidence not subject to objection to warrant the decree.

As the creditors who are joined as defendants are equally interested in the sale of the lands with the plaintiffs, and have concurred in asking the appointment of a trustee for that purpose, it does not seem right to saddle the plaintiffs with all the costs. The costs should be paid out of the proceeds of the sales, and it is so ordered. To that extent the decree of the court below is modified. In all other respects the judgment is affirmed. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. JAMES H. SCOTT,
Appellant.

1. *Practice, criminal*—*Obtaining money under false pretenses, indictment for*—*Intent, allegation of, what sufficient*—*Question of intent for the jury.*
—In an indictment under the statute (Wagn. Stat. 461, § 47) for obtaining money under false pretenses, it is not necessary to allege the intent of the accused to be to cheat, injure, or defraud any particular person. (See Wagn. Stat. 517, § 41.)

In such an action, the principal fact having been proved, the question of intent is one for the jury.

Appeal from St. Louis Criminal Court.

John Hallum, for appellant.

I. It is not necessary, in prosecutions for forgery, to charge a design to defraud any person or corporation; but this is of the essence of the offence where the whole gravamen of the crime complained of is directed, as in this case, against one individual.

II. The indictment does not charge that the check was not paid. (1 Chit. Cr. Law, 168-9; see generally 2 Burr. 1127; *The People v. Gates*, 15 Wend. 318.)

III. The indictment does not charge that any crime was actually perpetrated. It simply charges an intent, the object of which was never executed. In forgery, the act of affixing the signature is in itself the consummation of the crime; not so in procuring the signature by means of false pretenses. The signature may be worthless, it may create no liability; it may be, too,

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an instrument from which no harm can result. (*The People v. Galloway*, 17 Wend. 540; *The People v. Williams*, 4 Hill, 9; *The People v. Wright*, 9 Wend. 193; *The People v. Gates*, 13 Wend. 311; *Dord et al. v. The People*, 9 Barb. 671; *Commonwealth v. Strain*, 10 Metc. 521, cited and approved by this court in *State v. Bonnell*, 46 Mo. 395.)

IV. The indictment does not charge that the prosecutor believed and acted on the alleged false pretenses when he indorsed the check. He must act on the belief that they are true, otherwise he cannot claim that he was injured or influenced by them. (*The People v. Stetson*, 4 Barb. 151; *Commonwealth v. Davidson*, 1 Cush. 33; *Bronson & Crocker v. Wiman*, 4 Seld. 182.) The indictment must show that the alleged indorser was damnified. (*People v. Thomas*, 3 Hill, 169.)

V. The indorsement of Conn, on any paper whatever executed or drawn by Scott, does not appear in any part of this record from beginning to end.

Counsel here went into a discussion of the testimony in the case.

Charles P. Johnson, for respondent.

I. In a prosecution under section 47, article III, chapter 42, Wagn. Stat., it is not necessary to charge a design or intent to defraud any particular person or corporation, or that any particular person or corporation was defrauded. The pleader is governed by chapter 42, article II, section 41, Wagn. Stat. (See Whart. Cr. Law, 6th ed., § 297.)

II. The indictment contains a "brief narration of the offense charged and a certain description of the crime." It is in accord with 1 Chit. Cr. Law, 167-9; 2 Burr. 1127; Whart. Prec., tit. False Pretences. It sets forth in detail the false representations and pretenses made to Conn to procure his signature to the check in question, and then falsifies each and every one of them by distinct and specific averments as in an assignment of perjury, and in accordance with the decision of this court in *State v. Peacock*, 31 Mo. 413; see also *People v. Herrick*, 13 Wend. 87; 2 Russ. Crimes, 303.

WAGNER, Judge, delivered the opinion of the court.

The defendant appealed from the judgment of conviction obtained against him in the Criminal Court, and the first objection assigned is the insufficiency of the indictment. The indictment sets out, in substance, that the defendant "unlawfully, knowingly, feloniously and designedly did falsely pretend to John N. Conn that a certain paper writing produced by the defendant to the said Conn, and purporting to be a check drawn by the defendant upon the National Trust Company of the city of New York for the payment, to the order of said defendant, of the sum of \$150 in current funds, was then and there a good, genuine and available order for the payment of the sum of \$150, and that the defendant kept an account with said National Trust Company, and that he had money in the hands of the said company for the payment of the said check; that he had full power, right and authority to draw checks upon said National Trust Company of the city of New York; by means of which false pretenses the defendant did then and there, unlawfully, knowingly, feloniously and designedly, obtain from the said Conn his indorsement in writing on the back of said check, with intent then and there to cheat and defraud." The indictment then, by distinct and specific averments, sets out the falsity of the pretenses and negatives the truth of the representations made by the defendant.

The indictment was under the statute (Wagn. Stat. 461, § 47), which provides that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, * * * shall, upon conviction thereof, be punished in the same manner and to the same extent as for feloniously stealing the money, property or thing so obtained." Here every allegation that was necessary was made. The false pretenses were clearly and precisely stated, and it is averred that by reason of them the signature of Conn was obtained on the back of the check. This renders the indictment good and sufficient. (State v. Bonnell, 46 Mo. 395.) It

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was not necessary to allege in the indictment that the defendant used the false pretenses or obtained the signature of Conn with the specific intention of cheating or defrauding any particular person or body. The statute has enacted a rule at war with any such assumption. It declares that it shall be sufficient in any indictment for an offense, where an intent to injure, cheat or defraud shall be necessary to constitute the offense, to allege that the defendant did the act with such intent, without alleging the intent of the defendant to be to injure, cheat or defraud any particular person; and on the trial of such offense it shall not be necessary to prove an intent on the part of the defendant to injure, cheat or defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to injure, cheat and defraud. (Wagn. Stat. 517, § 41.)

The principal fact being proved, the intent with which the defendant did the act was for the determination of the jury. There is no contradiction or doubt about the evidence. It clearly shows that defendant applied to Conn to give him the money on the check, representing that he had \$4,000 deposited in the bank, and that the check was good and would be paid on presentation; that Conn declined advancing the money, but went with him to the Accommodation bank and introduced him to the cashier, and informed the cashier what the defendant wanted. The cashier refused to pay the money on the check without a local or resident indorser. The defendant then reiterated the statement that the check was good, would be paid on presentation, and that he had the \$4,000 deposited in the bank. But the cashier still refusing, Conn, seeing he was placed in an unpleasant situation, having introduced the defendant, stepped forward and indorsed the paper, and the money was paid over to the defendant.

The check was then sent to New York for payment, where it was protested and returned, and Conn was obliged to pay it. The evidence further shows that the representation of the defendant was wholly false; that he had no money on deposit in New York, and never had an account with the bank on which he drew the check. To evade all guilty intent an attempt is made to show that defendant expected his brother to protect his credit and

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furnish the money to cash the check. It appears that he sent a telegraph dispatch to his brother in New York to pay the amount, and that his brother was absent and the money was not paid. His brother says in his deposition that had he been at home at the time he would have advanced the money and taken up the check; but this does not release the defendant from the falsity of his pretenses when he obtained the signature of Conn and the money at the bank.

That he was guilty of false representations is unquestioned, and the finding of the jury is conclusive as to the intent with which these representations were made. We see nothing erroneous in regard to the admission of testimony. The trial seems to have been entirely fair, and the judgment must be affirmed. The other judges concur.

T. A. MEYSENBURG, TRUSTEE FOR BERNARD N. STERNBERG,
Appellant, v. C. W. SCHLIEPER, CHARLES BORG AND ROBERT
BARTH, Respondents.

1. *Injunction — Delay in sale of personal property — Depreciation — Measure of damages — Construction of statute.* — When delay in the sale of personal property is caused by an injunction, and the depreciation in the salable value of the property is an incident of the delay, the loss, within the meaning of the statute (Wagn. Stat. 1030, § 11), is held to be "occasioned" by the injunction. And the depreciation is the measure of damages.
2. *Mortgages and deeds of trust — Injunction to stay — Sale under deed of trust — Action of damage under — Measure of damages.* — By the terms of a deed of trust on personal property, upon the non-payment of the first note at maturity, all the others became at once due, and the property might be sold to satisfy them. The first note when due was unpaid, and the property was advertised for sale, but the sale was prevented by injunction. Subsequently, before the second note became due, the first note was paid, the injunction was dissolved, and the property, on maturity of the second note, was sold to satisfy the remaining indebtedness. But meanwhile, pending the injunction, the property had greatly fallen in value, and failed to satisfy various encumbrances which had been put upon the property. In an action of damages against the plaintiffs in the injunction, by the holder of a subsequent unsatisfied deed of trust, it was contended by defendants (plaintiffs in the injunction) that an actual sale was a necessary condition to the maturity of the notes not due on their face; and that hence,

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no sale occurring, they were not responsible for a depreciation in the value of the property up to the time when the second note purported to be due; but *held* by the court, that defendants having, by their unwarrantable interference, prevented the sale, could not avail themselves of the non-performance which they had occasioned.

Appeal from St. Louis Circuit Court.

The Borg deed of trust was given May 28, 1867, to secure four notes for \$1,750 each, of that date, and payable in one, two, three and four years respectively. Previous to this deed another had been given, November 14, 1866, to one Barth, to secure the payment of certain other notes. On the 19th of October, 1867, Windeck, being owner of half of said property, subject to the foregoing deed of trust, conveyed his interest to plaintiff Meysenburg, to secure a note of \$1,200 in favor of Sternberg, due sixty days from date.

On the 10th day of April, 1868, the real estate was sold under the first or Barth deed of trust for some \$9,400, which amount paid the first debt, and left a surplus of \$3,719.85.

Two thousand three hundred and ten dollars of principal and interest falling due on the Borg notes, the property was advertised under that deed for sale on the 26th of June of the same year, but the sale was prevented by the plaintiffs' injunction.

On the 3d day of December of that year, the surplus of \$3,719.85 was paid over to defendant Schlieper, the beneficiary in the second or Borg deed of trust. At that time only the first Borg note for \$1,750 was due, and the payment far more than satisfied that note, principal and interest, and went toward the satisfaction of the one due May 28, 1869. The property was afterward sold under the Borg deed of trust, in July, 1869.

For the facts in this case see also the opinion of the court, and the same case as reported in 46 Mo. 209.

Geo. P. Strong, for appellant.

I. The payment of the \$3,719, December 3, 1868, discharged all of the debt that was due, and destroyed or took away all the right of Schlieper's trustee to sell. It therefore took away whatever right he ever had to be compensated for any depreciation of the property; it suspended his right of sale until May

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28, 1869, and before that time both injunctions had been dissolved. (*Salmon v. Claggett*, 3 Bland, 179; *Kennedy's Adm'r v. Hammond*, 16 Mo. 357; *Reddlesbarger v. McDaniel*, 38 Mo. 142.) The depreciation of paper currency forms no part of the damages. (*Bircher v. Parker*, 40 Mo. 121; *Roach v. Burnes*, 33 Mo. 323.)

II. The only remedy remaining, if any did remain, was by an action on the injunction bond. The first case was out of court; and in the second there was a final judgment against the sureties for the costs which constitute damages secured by the bond. No second judgment could be rendered against them.

III. The engine, machinery, etc., were fixtures and passed to the grantee of Barth, trustee. The testimony shows that all this machinery was attached to the soil and freehold in such a way as to make it a permanent attachment to the soil, and therefore, as between grantor and grantee, mortgagor and mortgagee, a fixture, passing with the realty under the sale by Barth, trustee. It was error to take their condition or relative value into the account at all in estimating damages. Schlieper had no interest in them. (*Rogers v. Crow*, 40 Mo. 93; *Pillow v. Love*, 5 Hayw. 109; *Phillipson v. Mullanphy*, 1 Mo. 620; *Beckwith v. Boyce*, 9 Mo. 560; *Cohen v. Kyler*, 27 Mo. 122; *Goddard v. Chase*, 7 Mass. 432; *Union Bank v. Emerson*, 15 Mass. 159; *McDaniel v. Moody*, 3 Stew. 314; *Dispatch Line v. Bellamy M. Co.*, 12 N. H. 205, 232-3; 4 Metc. 306; 7 Watts, 106; 19 Pick. 314.)

There is no testimony of any depreciation between the date of the granting and the dissolution of the first injunction. There is a total want of any proof that the depreciation was the consequence or direct effect of the injunction.

Kehr, for respondents.

I. The injunctions having been dissolved, Schlieper is entitled under the bond to recover all damages occasioned by such injunctions. Upon the dissolution of an injunction restraining the sale under a deed of trust, the court, in assessing the damages, should ascertain the probable amount that would have been realized, the

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destruction or deterioration of the property, the depreciation of its market value, expenses of litigation, and all other matters of loss or injury sustained by the creditors in consequence of the injunction. (Kennedy's Adm'r v. Hammond, 16 Mo. 341; City of St. Louis v. Alexander, 23 Mo. 522; Reddlesbarger v. McDaniel, 38 Mo. 141-2.)

II. (a) In both his petitions herein, appellant Sternberg has treated the articles as personal property; he has enjoined their sale as such, and cannot now gainsay what by the record he has alleged. (b) The articles are not fixtures, as between vendor and vendee. Machinery does not pass with the freehold. (Lacy v. Gibony, 36 Mo. 320; Collins *et al.* v. Mott, 45 Mo. 101; Hunt v. Mullanphy, 1 Mo. 508.)

III. On the non-payment of the first note all the others became due; and it is a fallacy to speak of the maturity of the first or second note, for if the right of sale existed, then *ipso facto* the entire debt and interest became due and payable. Whoever prevents the performance of a condition cannot take advantage of its non-performance. (Major v. Hickman, 2 Bibb, 217; Carroll v. Collins, *id.* 431; Clendenin v. Paulsel, 3 Mo. 230.) The appellant cannot say that the debt did not mature because we did not sell; for nothing but his wrongful act in suing out the injunction prevented us from selling. He cannot take advantage of his own wrong; and hence the test is, had we the right to sell? But the right to sell on the respective days for which the property was advertised was adjudicated in our favor in the original cases, and is therefore no longer an open question.

IV. The appellant assumes that the \$3,719.85 real estate surplus, which of right belonged to Schlieper as second encumbrancer, and which the court, on the 3d of December, 1868, ordered to be turned over to him, extinguished Schlieper's first and second note. This is not so.

(a) The whole debt (and not only the first and second notes) was then due by virtue of the right to sell on the 1st of December, 1868.

(b) By the terms of the deed of trust the trustee was authorized to sell the property conveyed, or any part thereof. The

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\$3,719.85, being the proceeds of the real estate mortgaged, represents but a part of Schlieper's security; the personalty represents the other part.

CURRIER, Judge, delivered the opinion of the court.

Windeck & Luebering conveyed the real and personal property described in the petition to the defendant Borg, in trust to secure the payment of certain notes. The said estate was at the time subject to a prior deed of trust in favor of a third party. Subsequently Windeck conveyed his remaining interest in the property, in trust to secure a debt due plaintiff Sternberg.

The personal property included in the second or Borg deed of trust was advertised for sale under that deed, the sale to occur June 26, 1868, one of the notes secured by it having matured, and default having been made in the payment of it. The plaintiffs stopped the sale by injunction, and the injunction was not removed until November 6, 1868. After the injunction was dissolved Borg again advertised, but the sale was again interrupted by a second injunction, which was also sued out by the plaintiffs. This second injunction was laid December 1, 1868, and dissolved May 15, 1869, the first suit in the meanwhile having been dismissed.

Subsequently to the dissolution of these injunctions, the court assessed the defendants damages as follows: Under the first at \$2,450; and under the second, \$773.63. The plaintiffs complain of these assessments as having been made under erroneous principles, and seek a reversal on that ground. The two cases were tried together in the court below, and have been so argued and submitted here.

The Circuit Court assessed the damages upon the principle that the plaintiffs were liable for the depreciation in the salable value of the property during the period the sale was suspended by the injunctions as well as for the costs and expenses incurred in defending against the injunction suits. The court also seems to have taken into consideration, in assessing the damages, the depreciation upon certain articles of property which the plaintiffs insist had been attached to the realty as fixtures, and had thus

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ceased, as the plaintiffs claim, to be personal estate. It is the action of the court in making these assessments that the plaintiffs object to and complain of as erroneous.

Prior to either of these injunctions Windeck & Luebering had become insolvent, so that the only reliance for the payment of the notes secured by the Borg deed of trust was the security furnished by that deed. One of the notes thus secured, and a year's interest on the remaining notes, became due the last of May, 1868; and the property in question, as we have seen, was advertised for sale under the Borg deed of trust on the 26th of June of that year. Had the sale been made as advertised, it satisfactorily appears that the whole debt secured by that deed would have been paid from the proceeds of the sale, and from the surplus arising from the sale of the real estate under the first deed of trust; the Borg deed of trust being the second encumbrance upon the realty, and the first upon the personalty.

The personal property, on the 26th of June, 1868, as the evidence shows, was well worth, and would have sold on that day, for at least \$4,000. The sale, however, was delayed by the injunctions so that it did not occur until July, 1869, when the property was duly advertised and sold for \$1,550, the plaintiff (Sternberg) becoming the purchaser. This result indicates depreciation in the salable value of the property of \$2,500. On whom should this loss fall? Was it, in the language of the statute (Gen. Stat. 1865, p. 667, § 11), "occasioned" by the injunctions? If it was, the plaintiffs should pay it, and the judgment of the Circuit Court so awarding should be affirmed; otherwise the judgment should be reversed.

In opposition to this view, the plaintiffs' counsel insist that the depreciation ought not to be taken into consideration, since, as he claims, the injunctions were not the direct cause of the depreciation. However that may be, the injunctions indisputably delayed the sale for nearly a year, and the \$2,500 loss was an incident of that delay. The injunctions, therefore, were the "occasion" of the supposed loss. In cases such as this the damages are to be measured by the extent of the "injury the creditor has sustained from the improper act of the party in

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stepping in between the creditor and his debtor," and thus postponing the enforcement of the creditor's rights. (*City of St. Louis v. Alexander*, 23 Mo. 522.) If property is deteriorated or destroyed during the suspension caused by an unwarranted injunction, the loss thence resulting is to be considered in assessing damages. (*Kennedy's Adm'r v. Hammond*, 16 Mo. 341; *Middlesburger v. McDaniels*, 38 Mo. 142.) The depreciation in the salable value of property occurring under the same circumstances falls within the same principle.

It has already appeared that the first injunction was dissolved November 6, 1868, and the second May 15, 1869. On the 3d of December, 1868, the defendant Schlieper, the creditor under the Borg deed of trust, was paid \$3,719.85, that being the surplus arising from the sale of the real estate under the first deed of trust. Schlieper's was the second encumbrance, and so entitled to that surplus. The \$3,719.85 exceeded the amount then due upon Schlieper's notes, as shown by the notes, apart from the deed of trust. On that fact the plaintiffs found the theory that all right to sell under the deed of trust was suspended as from the beginning, and irrespective of the injunction, till the maturity of the note next falling due, to-wit: May 28, 1869. The injunctions were removed prior to that date, and it is accordingly argued that the injury resulting from the depreciation of the property is not traceable to any delay caused by the injunctions.

This view of the matter involves an examination of the provisions of the deed of trust bearing upon the construction of the notes, as respects the date of their maturity. The deed provided that "in case the property should be sold on account of the non-payment of any one of said notes, or the interest on any one of them, then all the notes should be considered due and payable" from the date of sale. The deed further authorized a sale of the property, or any part of it, if the notes or any one of them, or any part of the interest, should become due and remain unpaid.

Twenty-three hundred and ten dollars of principal and interest became due in May, 1868, and the property was accordingly duly advertised for sale on the 26th of the following June, in accordance with the terms of the deed. The sale, however, as we have

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seen, was prevented by the wrongful interference of the plaintiffs. At that time Borg had an undoubted right to sell the property, and the whole of it, and apply the proceeds to the payment of the notes, whether due upon their face or not. For the purpose of foreclosing the deed of trust, the notes, as the deed provided, were to be considered and treated as falling due upon the occurrence of the first default. By the terms of the deed it was the right of Borg to sell the property and pay the notes as far as the proceeds would go, although only one of them might, according to their terms, be actually overdue. He sought to avail himself of this right, but was defeated by the wrongful acts of the plaintiffs. They wrongfully interposed and stopped the sale, and now urge the non-occurrence of the sale as a reason why they should not be held to liability. Is it warrantable for them thus to take advantage of their own wrong? I think not. They wrongfully stopped the sale, and the consequences of that wrongful act they must meet and bear. If the notes did not all become due and payable on the 26th of June, 1868, it was because of their unjustifiable interference. Their interference was not only the occasion but the primary cause of the loss and damage for which the defendants now seek compensation.

The sales did not in fact occur as originally advertised; therefore, say the plaintiffs, only one note and the interest was due and payable, and so much was actually paid (the plaintiffs insist) from the proceeds of the sale of the real estate under the first deed of trust, prior to the maturity of the note next falling due. But the sale did not occur as advertised because the plaintiffs enjoined it. The non-occurrence of the sale was one of the consequences of the injunction. The defendants were injuriously affected thereby, and the plaintiffs must make good the loss. If an actual sale was, as the plaintiffs claim, a necessary condition to the maturity of the notes not due upon their face, the plaintiffs prevented the performance of that condition, and are therefore not in a position to urge its non-performance as a reason why they should not be held liable. It is laid down as a "general principle that he who prevents a thing from being done shall not avail himself of the non-performance which

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he occasioned." (Majors v. Hickman, 2 Bibb, 219; *id.* 431; Clendenin v. Paulsel, 3 Mo. 230.)

In my judgment these just principles should be applied to the causes under consideration. The previous litigation (see 46 Mo. 209) has established the proposition that the plaintiffs had no right to interfere, and the evidence shows that their interference resulted in the damages assessed against them. The principles involved apply to both injunctions, the second as well as the first. On the 1st of December, 1868, nothing had been paid, and the defendants might then have sold but for the injunction which the plaintiffs wrongfully interposed on that occasion.

To sum up on this point: The property was advertised for sale June 26, 1868, and would have been sold on that day but for the first injunction. Upon the dissolution of that injunction the property was again advertised for sale December 1, 1868, and would have been sold on that day but for the second injunction. These injunctions were wrongful, and suspended the sale for a year, during which period the property greatly depreciated in its salable value, to the manifest injury of the defendants. The injunctions caused the delay, and the delay resulted in loss. The injunctions, therefore, if not the direct cause of the loss, were at least the "occasion" of it, and it is but simple justice that the plaintiffs should respond in damages.

But it is urged by the plaintiffs that the depreciation was assessed in part upon an engine, etc., which, as they claim, had been attached to the realty as permanent fixtures. Assuming this to be true, the plaintiffs then insist that the title to the engine, etc., was transferred by the sale of the real estate under the first deed of trust, and thus wholly withdrawn from sale under the Borg deed of trust.

The theory is well; but the plaintiffs, in order to maintain it, are obliged to assume a state of facts in direct conflict with the averments of their petition. It is averred in the petition that the engine, as also the other articles now claimed to have been fixtures, were "personal property." If personal property, they constitute no part of the real estate, either as fixtures or otherwise. The claim that the engine, etc., were fixtures is an after-

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thought, and one that cannot be harmonized with the allegations of the petition.

Again, the court below declared the law in relation to fixtures precisely as the plaintiffs requested, but the facts were found against them, and I see no occasion for interfering with the result. The property was treated on all hands and by all parties, as far as appears, as personal property.

The other judges concurring, the judgment will be affirmed.

ALICE COLLINS *et al.*, Respondents, v. JOHN BANNISTER,
Appellant.

1. *Leasehold estate* — Possession of, prima facie evidence of ownership.— Possession of a leasehold estate after the death of the lessor, by his heirs, is prima facie evidence of their ownership of the same.

Appeal from St. Louis Circuit Court.

Plaintiffs' petition contained two counts, one for ejectment and the other for trespass. Plaintiffs' evidence disclosed the following facts. Sweringen and others, in 1859, leased the lot claimed by plaintiffs to one Lloyd J. Cooper for a period of ten years, expiring in October, 1869. In 1861, Cooper sold to Dennis Collins and continued to live in it as the tenant of Collins. Dennis Collins died before the expiration of the lease, about the year 1865, leaving a widow, Alice Collins, and four sons, who are made parties to this suit. Cooper testified that he lived in the house till after Dennis Collins' death, and then he turned over the possession to the widow, Alice Collins. The plaintiffs' evidence further showed that defendant, John Bannister, had built a house on the lot next the one claimed by plaintiffs under said lease, and that from three to nine inches of his cellar was built on plaintiffs' lot; that some earth was removed from said lot, and that the building was injured by sinking caused by the removal of the earth.

For facts in the case see also opinion of the court.

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Pattison, for appellant.

I. The lease for ten years was a chattel interest, and therefore went to the executor or administrator, Dennis Collins. (*Gutzweiler's Adm'r v. Lackman*, 23 Mo. 168; *Leakey v. Maupin*, 10 Mo. 368; see also *Dawes v. Boylston*, 9 Mass. 337, 350; *Tharp v. Stallwood*, 5 Man. & Gr. 760; *Clapp v. Stoughton*, 10 Pick. 463; 1 Wms. Ex'rs, 546, and cases cited; *Jewett v. Smith*, 12 Mass. 309; *Foster v. Bates*, 12 Mees. & W. 226; 1 Wms. Ex'rs, 528, and cases cited.) Hence suit for an injury to the leasehold must be brought by Collins' administrator. (See *Smith v. Denny*, 37 Mo. 20.)

II. Nor does the length of time that has elapsed since the death of Collins affect the question; and it will not do to say that the plaintiffs may be holding as distributees. If distribution has taken place, this is a link in the chain of evidence necessary to make out their title, and they must show it.

III. There were two counts, one in ejectment and one in trespass, yet there was a general finding. (*Mooney v. Kennett*, 19 Mo. 551.)

Peacock & Cornwell, for respondents.

I. The objection now urged for the first time, that there is one judgment on two counts, certainly is made here too late. (*Thames v. Erskine*, 7 Mo. 213; *Finney et al. v. The State*, 9 Mo. 624; *Boyse v. Crickard*, 31 Mo. 530.)

II. The time that intervened between the death of Dennis and the institution of the suit—to-wit: seven years—raised the presumption that the estate had been administered on and administration was closed, the court presuming that the law has been complied with in the absence of proof to the contrary.

III. Plaintiffs being in possession under the lease, they, as in all cases of possession of personalty, must be presumed to be the owners.

IV. The possession in 1868-9, in the absence of proof to the contrary, will raise the presumption that they were the distributees of the estate for the interest of which they had the possession.

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CURRIER, Judge, delivered the opinion of the court.

It is objected that the plaintiffs do not show themselves to be the owners of the subject of the suit, to-wit: a leasehold formerly held by one Dennis Collins, who is shown to have died in 1862. Alice Collins, one of the plaintiffs, is his widow; the other plaintiffs are his surviving children. The point is made that the leasehold was a mere personal chattel, and that it consequently passed to the administrator, and not to the heirs, upon Collins' death. It is urged that a suit for the possession of the property, or for an injury to it, should have been brought by the administrator, and not by the present plaintiffs.

Dennis Collins died some seven years prior to the institution of the suit. In the absence of evidence to the contrary, it might not be unreasonable to infer from this lapse of time a settlement and distribution of the decedent's estate. However that may be, it is certain that the possession of a personal chattel is *prima facie* evidence of ownership. (1 Greenl. Ev., 12th ed., § 34.) The plaintiffs here, according to an averment in the petition, were in actual possession of the property at the time the trespass complained of was committed; and that averment is not controverted by the answer. The fact of possession is therefore admitted by the pleadings, and the possession was evidence of ownership. The defendant's instruction, founded upon the idea that there was no evidence of title, was consequently properly refused.

But there were two counts in the petition, one in trespass and one in ejectment. The lease, however, expired pending the suit, and there was no judgment for possession. The count in ejectment seems to have been overlooked or disregarded in the final disposition of the case. The trial was by the court, and the assessment of damages (\$50) was general, without an apportionment of them to the respective counts. No objection to this was taken in the court below. The judgment was for the right party, was reasonable in amount, and will be affirmed. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. PATRICK BURNS,
Appellant.

1. *Practice, criminal—Venue—St. Louis county—City of St. Louis.*—In the trial of a criminal for an offense charged to have been committed in the county of St. Louis, if there is evidence to reasonably satisfy the jury that the crime was committed in the city of St. Louis, the venue will be sufficiently established.
2. *Practice, criminal—Crime must be shown to be committed within the county—Question of venue for the jury.*—In criminal trials it must always appear that the offense of which the prisoner is convicted is within the jurisdiction of the court. But the question of venue is always a question of fact, and it may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the prisoner is indicted was committed in the county where he is tried, it is sufficient.

Appeal from St. Louis Criminal Court.

J. Hallum, for appellant.

The prisoner is charged with committing the offense within the county of St. Louis. The proof shows that it was committed in Mullanphy street, but does not show that this street was in the county of St. Louis. Hence the jurisdiction of the court is not shown. (See Const. U. S., art. 1, § 6; Mo. Bill of Rights, art. 1, § 18; *Ewell v. State*, 6 Yerg. 364; *Hite v. State*, 9 Yerg. 357; *Yates v. State*, 10 Yerg. 549; 1 Chit. 178; 2 Leach, 637; 2 East, 605; 2 Russ. Crimes, 799-800; Bish. Cr. Law, 552-67, § 8; Rosc. Crim. Ev., tit. Venue, 250-259; 1 Whart. Cr. Law, § 601; *Rex v. Crocker*, 2 N. P. 87; *Anderson v. State*, 14 Tex. 533; *People v. Slater*, 5 Hill, 401; 1 Phil. Ev. 206; *Morsley v. State*, 7 Blackf. 424; *Gordon v. State*, 4 Mo. 375.)

Charles P. Johnson, for respondent.

The jurisdiction of the Criminal Court extends over the county of St. Louis. (Gen. Stat. 1865, p. 894.) The Legislature has recognized the city of St. Louis as being within the county of St. Louis. (Gen. Stat. 1865, p. 894, § 17; Wagn. Stat. ch. 142, § 15.) It was a question of fact for the jury to determine whether or not the defendant committed the offense as laid

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in the indictment, and the instructions of the court presented the issue clearly and perspicuously before them. The rule has been promulgated time and again in the decisions of this court—a rule sustained by extensive and incontrovertible authority—that it will not disturb the verdict of a jury unless manifest injustice and wrong have been done. (*State v. Cruise*, 16 Mo. 611; *State v. Packwood*, 26 Mo. 340; *Hartt v. Leavenworth*, 11 Mo. 629; *Campbell v. Hood*, 6 Mo. 218; *McLean v. Bragg*, 30 Mo. 26; *State v. Burnside*, 37 Mo. 343.)

WAGNER, Judge, delivered the opinion of the court.

The accused was indicted, in connection with Patrick Duffy and Mary Ostermeyer, for murder in the first degree, convicted and sentenced to be executed. No exceptions were taken or saved to any ruling of the court on the trial, and an examination of the record has fully convinced us that the action of the court was entirely proper and unexceptionable. The only point now raised is that the record does not show that the crime was committed in St. Louis county. The witnesses all speak of the murder as taking place on Mullanphy street, but it is not expressly stated anywhere that Mullanphy street is in the county or city of St. Louis.

The indictment avers and charges that the crime was committed in the county of St. Louis, and the court instructed the jury that if they believed and found from the evidence that in the county of St. Louis the defendant did assault and kill Ostermeyer, then they should find him guilty, etc. From this instruction the jury must have found that the killing occurred at the place laid in the indictment. It was a conceded fact in the Criminal Court; the witnesses spoke of the street, and there was a diagram exhibited showing the location of the house and how situated.

The jurisdiction of the Criminal Court extends over the county of St. Louis, and the Legislature has recognized the city of St. Louis as being within the county of St. Louis. If there was evidence to reasonably satisfy the jury that the crime was committed in the city, that was sufficient. In criminal trials it must always be shown that the offense of which the prisoner is convicted

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was committed within the jurisdiction of the court. (Gordon v. The State, 4 Mo. 375.)

But the question of venue or jurisdiction is always a question of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the prisoner is indicted was committed in the county where he was tried, it is sufficient. (1 Whart. Cr. Law, § 601.) We cannot discover any such error as would justify us in disturbing the verdict.

Judgment affirmed. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. PATRICK DUFFY,
Appellant.

1. State v. Burns, *ante*, p. 438, affirmed.

Appeal from St. Louis Circuit Court.

Chas. P. Johnson, Circuit Attorney, for respondent.

Jno. D. Stevenson and Geo. Babcock, for appellant.

WAGNER, Judge, delivered the opinion of the court.

The record in this case is essentially the same as that of State v. Burns, *ante*, p. 438. For the reasons therein stated, the judgment of conviction will be affirmed. The other judges concur.

T. A. MEYSENBURG *et al.*, Appellants, v. C. W. SCHLIEPER *et al.*,
Respondents.

1. Meysenburg v. Schlieper, *ante*, p. 426, affirmed.

Geo. P. Strong, for appellants.

E. C. Kehr, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is the counterpart of Meysenburg v. Schlieper, *ante*, p. 426, and the decision in that case determines the disposition to be made of this.

ISAIAH POE *et al.*, Appellants, *v.* ANTOINE DOMEK *et al.*,
Respondents.

1. *Practice, civil—Pleading—Petition—Description of a deed in—Execution—Consideration—Demurrer.*—A petition may describe a deed simply as a "conveyance," and under the statute its execution will be sufficiently implied from that term; and although it fails to allege a consideration of any sort, and fails to aver that the deed was one of gift, yet it will not be for that reason bad on demurrer as not stating a cause of action. The petition would be informal, and might be corrected on motion to make it more definite and certain. But defendant, having waived the informality and gone to trial upon answer, could not afterward say that it set up a void conveyance. And the allegation will be held sufficient to let in evidence and sustain a judgment.

Appeal from Cape Girardeau Circuit Court.

Lewis Brown, for appellants.

I. A petition need not be more explicit than the statute. The statute says: "Conveyances of land, or any interests therein, may be made by deed," and, when speaking of a transfer of title, designates it as a deed. (Gen. Stat. 1865, p. 444; Wright v. Christy, 39 Mo. 125.) The language used by the pleader concerning the conveyance or deed is as follows: "This defendant, Isaiah Poe, made and delivered to the said William H. a conveyance of the fee simple of said realty by covenants of general warranty." This is certainly definite enough. (See 3 Danl. Ch. Pr. 2073; 1 Danl. Pr. 368-73.) And the text states that the instrument need not be critically stated, except when the difficulty lies in its construction. (Steph. Pl. 311; 1 Chit., 9th Am. ed., 305; Sto. Eq., 7th ed., §§ 252-5; see also Jones v. Louderman, 39 Mo. 290; Loler v. Cool, 37 Mo. 86.)

If a party covenanted to make a conveyance of the fee simple by covenants of general warranty, would he not be held to make a deed such as is designated by the statutes under the term "Conveyance?" (Smith v. Hayes, 9 Greenl. 128; Brown v. Ganon, 14 Mo. 276; Lawrence v. Dole, 11 Verm. 276; Tinney v. Ashley, 15 Pick. 546; Tremaine v. Liming, Wright, 644; Busby v. Smith, 15 Mo. 391; Chauvin v. Wagner, 18 Mo. 551-3.) General words are sufficient, says Coke, where the

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certainty lies within the knowledge of the defendant. So, if the words ascertain the lands which are demanded, it is sufficient to plead a conveyance of them *inter alia*. (Coke, tit. Pleader, ch. 26; see also Ludwich, 1007.) It has been frequently held, and our statute contemplates, that it is only those defects that are incurable that the defendant can take advantage of at the trial. (Loler v. Cool, *supra*; Jones v. Louderman, *supra*; Burnham v. DeBevorse, 8 How. Pr. 159; Lawrence v. Wright, 2 Duer, 673; St. John v. Northrup, 23 Barb. 30; Coates v. Galena, 18 Iowa, 277.)

II. If the objection was substantial, it was apparent on the face of the petition. Hence he should have demurred; and failing to do so, the right was waived and they should have met the issue.

Davis & Sanford, for respondents.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs file their petition to set aside certain deeds for fraud, and to declare title in themselves, claiming that their ancestor had received a deed, which was not recorded, and died; that his father, the grantor in the deed, was appointed his administrator, failed to inventory the property, destroyed the deed, and conveyed the land to others. Upon the trial defendants objected to the introduction of evidence by the plaintiffs, upon the ground that the petition did not state facts sufficient to constitute a cause of action, and specifically object to it because it did not set out the deed alleged to have been destroyed with sufficient particularity. The petition charges that "this defendant, Isaiah Poe, made and delivered to said William H. a conveyance of the fee simple of said realty by covenants of general warranty." The parties and the land had been before sufficiently described, but the record says that the petition was objected to because it "does not state whether the deed was or was not executed as the law directs—alleges no consideration therefor." As to the execution of the deed, it is implied in the description of the instrument as a conveyance, which is a statutory word, and to go into details would be useless prolixity. But the more important question

arises whether the pleader, in order to describe a valid instrument, should not have set forth its consideration, or at least averred that it was made and delivered for a good or for a valuable consideration. And this compels us to note the difference between a deed of bargain and sale and a common-law enfeoffment. To sustain the former some money or valuable consideration, though ever so small, was essential. Before the Statute of Uses, it was treated rather as a contract for land than as a transfer of title, and the bargainor held the title for the use of the bargainee. The Statute of Uses vests in the *cestui que use* all such titles, and though the effect of such an instrument has, when possession passes, become the same as a common-law conveyance, yet a consideration is still generally considered as necessary; and if necessary, it must be set out in any pleading that counts upon it. An enfeoffment, on the other hand, was primarily a gift, the consideration was feudal service, and it was always accompanied by formal delivery of possession. No consideration was necessary except the expected service, and a writing even was not essential at common law, although a deed or charter of feoffment was usual, in which the apt words were "give and grant." (Shep. Touch. ch. 9.) But the distinction between the two kinds of conveyances is practically abolished with us. The word "grant," as well as "bargain and sell," is usually employed in a deed, and the statute provides that conveyances may be made by deed executed, etc., without any other act or ceremony whatever. Judge McGirk, in *Perry v. Price*, 1 Mo. 553, treats the registration as a substitute for livery of seizin; but whether the deed be registered or not, as between the parties it operates as a constructive delivery of possession, and the grantee is seized unless there is adverse possession.

An ordinary conveyance, under our statute, is a feoffment as well as bargain and sale, and a pecuniary consideration is not essential to its validity. (3 Washb. Real Prop., 3d ed., 320.) It may be a gift, and still the title will pass; hence we cannot say that a petition fails to state facts sufficient to constitute a cause of action if it does not give the consideration of a deed

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counted on, for there may have been none. I consider the petition informal, but the objection comes too late. It should have alleged the consideration, or that it was given for a valuable consideration, or that it was a deed of gift; and if the defendants were interested in that question, the defect could have been corrected upon motion to make the pleading more specific. But having waived the informality and gone to trial upon answer, the defendants could not say that it set up a void conveyance; for, as we have seen, it might have been a good one, though given without any consideration.

I say nothing of the form of the deed, for it does not appear; nor of the effect of a deed of gift upon the rights of creditors, for they are not objecting; but only that, upon answer denying the existence of the instrument, the allegation is sufficient to let in evidence and sustain a judgment.

The other judges concurring, the judgment will be reversed and the cause remanded.

MARCEUS SAMUELS, Respondent, v. NANCY SHELTON AND MILTON C. WILLIAMS, Appellants.

1. *Conveyances — Sheriff's deed, defective acknowledgment of — Not aided by record.*—The record of a certificate of acknowledgment to a sheriff's deed, made by the clerk of a Circuit Court (Wagn. Stat. 612, § 56), is inadmissible to sustain an original acknowledgment thereof, where the latter was defective.
2. *Conveyances — Acknowledgment — Clerical error.*—A certificate of acknowledgment indorsed on the back of a sheriff's deed is not invalid because it recited that "he appeared in court and acknowledged that he executed and delivered a deed for the uses," etc., and did not specifically refer to the deed acknowledged. No material or necessary part of the certificate was omitted, and the intention was sufficiently clear on the face of the paper.
3. *Conveyances — Seal — Scrawl sufficient.*—In a sheriff's deed, a scrawl appended to his name, with the word "seal" written therein, is, under the laws of this State, a sufficient seal.
4. *Sheriff's deed prima facie evidence of the truth of its recitals.*—Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are *prima facie* evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts. But the recitals may be invalidated or destroyed by the party resisting the deed.

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5. *Conveyance—Acknowledgment of by deputy sheriff in his own name invalid.*—An acknowledgment to a deed, of land sold under execution, made by a deputy sheriff in his own name, is invalid.
6. *Mechanic's lien on frame building would not authorize the sale of the land.*—Under the statute of 1855 (R. C. 1855, p. 1068, § 10), a mechanic's lien simply attaching to a frame building would not authorize the sale of the land.
7. *Equity—Notice—Lis pendens.*—A suit pending is not notice to a purchaser, so as to affect and bind his interest, until the writ served after petition filed.

Appeal from Adair Circuit Court.

Barrow & Millan, for appellants, among other points made the following:

The court erred in admitting in evidence the sheriff's deed to David Mulanix. There was no evidence to show that an execution had ever been issued by the justice and returned *nulla bona*, nor before what justice the judgment it recited was rendered. (*Carr v. Youse*, 39 Mo. 346; *McCormick v. Fitzmorris*, 39 Mo. 32, 33.)

The deed is not acknowledged according to law. The certificate indorsed upon the deed fails to comply with the requirements of the statute. (Gen. Stat. 1865, p. 445, §§ 13, 14; *id.* 646, §§ 55, 56.) It does not refer to any particular deed. There is nothing to show that it has any relation whatever to that upon which it is indorsed. It does not state that Beaty was known to be the person whose name appears to the deed. (*Allen v. King*, 35 Mo. 216.) The record of the Circuit Court offered in evidence, even if admissible, cannot cure the defect. If a purchaser at a sheriff's sale takes a deed defectively acknowledged, he takes it at his peril. The statute requires the certificate of acknowledgment to be indorsed upon the deed itself. (Gen. Stat. 1865, p. 646, § 56.) But the record of the certificate was incompetent. The law simply requires the clerk, as an officer of the court, to make an entry of the acknowledgment, giving names of the parties to the suit and a description of the property conveyed, merely to show the final determination of the cause. There is nothing to show that the deed referred to in the record entry is the deed offered in evidence by plaintiff. It does not contain the statutory requisite to a valid acknowledgment. It does not pur-

port to be of the same date as the pretended acknowledgment upon the deed.

The court erred in admitting in evidence the deed to plaintiff, Marceus Samuels. There was no evidence before the jury that the parties signing the same were the heirs of David Mulanix, or that they were the only heirs.

The court erred in permitting the plaintiff to prove by Major P. Roberts that he was not served with process in the cause in which the decree was rendered. The pendency of the suit was notice from the time of the commencement of the same.

The evidence shows plainly that Roberts appeared in person or by attorney in the course of the trial, and such an "appearance to any regular steps in the progress of a cause is a waiver of notice." (*Bonney v. Baldwin*, 3 Mo. 49; *Bartlett v. McDaniel*, 3 Mo. 55; *Denton v. Noyes*, 6 Johns. 295.)

The decree against him cannot be impeached collaterally. (*Bernecker v. Miller*, 44 Mo. 102.)

Ellison & Ellison, for respondent.

The names of the parties to a suit, and the description of the property sold, need not be indorsed on the back of the sheriff's deed in the acknowledgment thereof. Such matter is only required to be entered in the record. (*Wagn. Stat.* 612, § 56; 41 Mo. 242.)

As to the sufficiency of the sheriff's deed from Roberts to Mulanix in regard to recitals, see 42 Mo. 219.

Appellant's sheriff's deed, acknowledged in name of deputy sheriff, is utterly void. (1 Mo. 504; *Atwood v. Reyburn*, 5 Mo. 533; 7 Mo. 362.) The fact of a deed being made and acknowledged by a deputy sheriff would perhaps not vitiate it, but he must do this in the name of his principal. (*Harriman et al. v. State*, 1 Mo. 504; *Atwood v. Reyburn*, *supra*; 7 Mo. 362.)

Shook not having any interest in the ground, the purchaser at sheriff's sale could only buy the building, and not that unless he removed the same within a reasonable time. In this case the sale under the mechanic's lien judgment took place October 15, 1860, while this ejectment suit was not instituted till May, 1867.

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A lapse of seven years is beyond the reasonable time contemplated by the statute.

The existence of the suit on which decree was founded was no notice to the purchaser at sheriff's sale, for the reason that there was never any service on Major P. Roberts so as to constitute a *lis pendens*, and there was no evidence of his appearance in person or by attorney. The suit, therefore, was no *lis pendens*. (40 Mo. 572; 1 Johns. Ch. 566.)

WAGNER, Judge, delivered the opinion of the court.

The action was ejectment to recover the possession of a lot in Linder's addition to the town of Kirksville. Each party claims from one Bailey as a common source of title. The ruling of the court, in admitting and rejecting evidence for the respective parties, constitutes the real and substantial question in the case. There was a deed from Bailey to one Major P. Roberts offered by plaintiff, and to this there was no objection. The plaintiff then offered and read in evidence a deed from the sheriff of Adair county to David Mulanix, dated June 1, 1860, conveying Major P. Roberts' title to the lot. This deed recited that the property was sold upon an execution issued from the office of the clerk of the Circuit Court, upon a transcript from a justice of the peace, etc. The objections interposed to the admission of this deed in evidence were: first, that it was not acknowledged and certified according to law; second, that it was not sealed; and third, that plaintiff did not first produce the transcript of a judgment legally rendered by a justice of the peace, filed, recorded and docketed among the judgments of the Circuit Court, and showing affirmatively that prior to the issuing of the execution under which plaintiff claimed said deed to have been made, execution was issued by the justice to the constable of the township in which the defendant therein resided, and by him returned *nulla bona*. The objections were all overruled by the court, and the defendant saved his exceptions. The plaintiff, to obviate the first objection and to aid the acknowledgment, read the record of acknowledgment made by the circuit clerk to the sheriff's deed. This, we think, was clearly inadmissible, as the deed itself must contain

the necessary certificate; and a defective certificate of acknowledgment cannot be sustained or helped by a resort to extraneous testimony. But the question then recurs, was the acknowledgment indorsed on the deed so defective as to render it inoperative?

The statute requires that the clerk of the court shall indorse on the sheriff's deed a certificate of the acknowledgment or proof under the seal of the court, and shall make an entry of such acknowledgment or proof, with the names of the parties to the suit and a description of the property thereby conveyed. (Wagn. Stat. 612, § 56.) Under this section, the names of the parties to the suit and the description of the property conveyed must be entered of record, but are not required to be included in the certificate of acknowledgment indorsed on the deed. The certificate made by the clerk on the deed is as follows:

"Andrew Beaty, sheriff of said county, appeared in open court and acknowledged that he executed and delivered a deed to David Mulanix, as his voluntary act and deed, for the uses and purposes therein expressed."

The only objection that can be plausibly urged against this certificate is that it does not specifically refer to the conveyance, but uses the phrase "a deed." This is without doubt a mere clerical error. The deed sets out the execution, the transcript and sale, and the purchase by Mulanix, and the certificate of acknowledgment is placed upon this deed by the clerk. It obviously refers to this deed and no other, and the mere inadvertence or clerical error of the officer making the indorsement ought not to be permitted to invalidate it. Had the certificate omitted a material or necessary part, it could not have been supplied by parol evidence; but here nothing is omitted, and the intention is sufficiently clear on the face of the paper.

The second objection, that there is no seal to the deed, is not true in point of fact, for the record shows that there is a scrawl appended to the sheriff's name, with the word "seal" written therein. This, according to the law of this State, is sufficient.

The third objection proceeds upon the hypothesis that before the deed was admissible in evidence it was necessary to produce the transcript of the judgment, showing that every step had been

taken which would authorize the issuing of an execution. This was undoubtedly the rule at common law, but our statute has changed it.

In *McCormick v. Fitzmorris*, 39 Mo. 24, it was decided that under our statute the recitals in the deed of the sheriff conveying the land of the defendant in the execution are presumptive evidence of the existence of the judgment and execution, and the other facts recited in the deed, and that the plaintiff need not produce the judgment and the execution. This principle was subsequently affirmed and applied to transcripts from justices' dockets (*Carpenter v. King et al.*, 42 Mo. 219), though in all such cases the recitals in the sheriff's deed amount to presumptive proof only, and may be destroyed or invalidated when attacked by the party resisting it. It is now the established doctrine that a copy from the docket of a justice of the peace certifying that an execution issued to the constable of the township in which the defendant resided, and setting out the return of the constable of *nulla bona*, is *prima facie* evidence to authorize the clerk of the Circuit Court to issue an execution on the transcript. (*Ruby v. Hann. & St. Jo. R.R.*, 39 Mo. 480; *Franse v. Owens*, 25 Mo. 329; *Burke v. Miller*, 46 Mo. 258.)

It is not perceived that this principle can work any injustice, for upon any objection being taken to the regularity of the execution on a motion to quash, the defendant may show the defect either in the justice's process or the constable's return. I see no error, therefore, in the action of the court in overruling the defendant's objection to the introduction of the sheriff's deed.

The plaintiff next, to complete his chain of title, read a deed from the heirs of Mulanix to the plaintiff for the lot in controversy, dated on the 9th day of March, 1864, and then rested. The objection to this deed was that it did not appear that Mulanix was dead, or that the parties conveying were his heirs. But that objection was met and surmounted by proof; and moreover, it was a question of fact upon which the verdict of the jury was conclusive. The defendant then offered in evidence a deed dated October 20, 1859, purporting to be from J. G. Oldum, sheriff and conveying the title of John Roberts in the property

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to them. This was objected to by the plaintiff on the ground that it was not properly acknowledged. The objection was sustained. There can be no doubt as to the propriety of the ruling of the court in this matter. The deed was acknowledged by the deputy sheriff in his own name as deputy, and therefore was no acknowledgment at all. The deputy can only act in the name of his principal. (*Atwood v. Reyburn*, 5 Mo. 533; *Evans v. Wilder*, 7 Mo. 362; *McClure v. Wells*, 46 Mo. 311.)

The next deed offered in evidence was a sheriff's deed dated October 17, 1860, in which the sheriff purported to convey the lot to one of the defendants in consequence of a sale arising upon a mechanic's lien in favor of Ransom and Shook. The lien was on account of materials furnished by Ransom to Shook, who built a small frame house upon the premises. This deed was read in evidence and the plaintiff objected, but the record nowhere shows that the objection was sustained. But it does not appear that Shook possessed any title to the premises. The lien attached to the building in preference to all other liens, but under the statute then in existence it only gave the purchaser the privilege of removing it within a reasonable time. (R. C. 1855, p. 1068, § 10.)

The next and last evidence introduced by the defendants was a decree rendered in the Circuit Court of Adair county in 1864, wherein one of the defendants in this suit was a plaintiff, and Major P. Roberts and John Roberts were the defendants. The decree in terms finds that Major P. Roberts had no interest in the lot, but that the same belonged to and was the property of John Roberts; and then proceeds to divest the title of John Roberts and invest it in the plaintiff. The plaintiff objected to the introduction of this decree, first, because it was not shown that Major P. Roberts was served with process prior to May 21, 1860, the date of the sheriff's sale to Mulanix, so as to constitute a notice of *lis pendens*; second, because the decree was irrelevant and insufficient, and was a nullity on its face. Whether Major P. Roberts was ever served with process in the suit does not definitely appear. He swears that he was not, but that would not avail the plaintiff if the proceedings anywhere showed a service or an appear-

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ance by him, or even a recital that he did appear; for no man will be allowed to aver anything contrary to the record. Unhappily, the court-house in Adair county has been burned, together with a large portion of the records of the county, and there are only fragmentary parts of the record embodied in this transcript. The summons and sheriff's return thereon, also the petition and answer, are wholly wanting. At a subsequent term of the court in 1862 (the original petition being filed in 1860), there is an entry made that the defendants have leave to file an amended answer. On whose application the order was granted is not stated. It is doubtful whether the record shows any such appearance on the part of Major P. Roberts as would bind him. At all events, we are satisfied that the record does not show any service or appearance on the part of Roberts, so as to constitute notice of *lis pendens*, till long after the purchase of Roberts' interest by Mulanix. (Fenwick v. Gill, 38 Mo. 525; Metcalf v. Smith's Heirs, 40 Mo. 572.)

Such being the case, we see no reason for interfering with the ruling of the court in excluding the decree. These are all the points raised, and they being settled, the result is that there was no error in the action of the court in giving and refusing instructions.

Judgment affirmed. The other judges concur.

THE STATE OF MISSOURI, Defendant in Error, v. HERMAN
WARNKE, Plaintiff in Error

1. *Criminal law — Indictment — Selling liquor on Sunday — Form of proceeding — Waiver.*— On indictment for selling liquor on Sunday, defendant submitted himself to the jurisdiction of the court and allowed judgment to go against him by voluntary confession and consent. The court had undisputed jurisdiction of the subject-matter of the indictment. *Held*, that it was competent for defendant to waive an objection urged against the form of the proceeding—as that it was by indictment instead of civil action. And having waived it in the trial court he could not raise it for the first time in the Supreme Court.

Error to Hannibal Court of Common Pleas.

W. H. & G. F. Hatch, for plaintiff in error.

No plea of guilty or consent of the defendant can confer jurisdiction over the subject-matter or change the form of proceeding prescribed by law. This court has held that in cases like this the civil remedy is the only one that can be pursued by the State, and that the offense here committed is not indictable. (*State v. Huffsachmidt*, 47 Mo. 73; *McCall v. Peachy*, 1 Call, 61-2; *Wickliffe v. Dorsey*, 1 Dana, 463; *Kennedy v. Terrill*, Hardin, 493; *Case, etc., v. Wooley*, 6 Dana, 20; *Brown v. McKee*, 1 J. J. Marsh. 476; *McHenry's Lessee v. Wallen*, 2 Yerg. 441; *Anderson v. Cannon*, 1 Cooke, 27; *Lindell's Adm'r v. Hann. & St. Jo. R.R.*, 36 Mo. 345; *Foley v. The People*, 1 Breese, Ill., 32; *Humphrey v. The State*, 1 Minor, Ala., 65.)

When the complainant's bill, as in this case, shows that the court has no jurisdiction, no plea to the jurisdiction is necessary. (*Moran & Haggin v. Masterson*, 11 B. Monr. 19.)

No motion to quash the indictment or motion in arrest was necessary. (*State v. Hammel*, 5 Mo. 260.) And whatever may be taken advantage of in arrest of judgment may be corrected by writ of error. (*State v. McKee*, 8 Mo. 495; *State v. Vaughn*, 26 Mo. 29, 30.)

The most liberal construction of this statute is to reverse, if any error appears on the record; although no express decision was had on the exact point in the court below. (*Hammel v. The State*, 5 Mo. 265.)

The common-law remedy is superseded by the statute, and the person enjoined must pursue the course pointed out by the act. The statute remedy is not cumulative upon the common-law action, but an entire substitution for it, and must be exclusively pursued. (*Lindell's Adm'r v. Hann. & St. Jo. R.R.*, *supra*; *McCall v. The Justices of Clark County Court*, 1 Bibb, 517; *McCall v. Peachy*, 1 Call, *supra*.)

M. L. Hollister, Circuit Attorney, and *Arthur B. Wilson*, for defendant in error.

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I. The Hannibal Court of Common Pleas, in which defendant was indicted, had jurisdiction both of the subject-matter and of the person of the defendant. (Wagn. Stat. 516, §§ 29, 32.)

II. The utmost that can be claimed for defendant is that the civil and not the criminal remedy should have been pursued. It presents merely a case of informality, the remedy being by civil action instead of indictment. The jurisdiction of the subject-matter of the offense and of the person of the defendant remains the same. The case of *The State v. Huffschmidt*, 47 Mo. 73, referred to by plaintiff in error, maintains the jurisdiction of the court over the offense named herein, but declares that the civil remedy must be pursued.

III. The record shows that the defendant, instead of moving to quash, appeared in court and pleaded guilty to certain indictments; and that others, by his consent and request, were dismissed at his cost. He waived all matters of form, and should not now be permitted to take advantage of his own negligence.

CURRIER, Judge, delivered the opinion of the court.

At the December term, 1869, of the Hannibal Court of Common Pleas, various indictments were found against the defendant for selling liquor on Sunday. At the succeeding June term, 1870, the defendant, attended by his counsel, appeared in court and pleaded guilty to some of the indictments, while others were dismissed by consent at his cost. This was done, as the record shows, under an arrangement with the prosecuting attorney to the effect that the cases should be so disposed of. In the cases where a plea of guilty was entered, a small fine was imposed and final judgment rendered. This writ of error is prosecuted to reverse these several judgments. The reversal is sought upon the ground that the court rendering the judgments acted without jurisdiction.

In *State v. Huffschmidt*, 47 Mo. 73, it was decided that the statute authorizing the prosecution of misdemeanors of this class by indictment had been repealed, and that the proper remedy in such cases was by civil action under the statute (Wagn. Stat. 516, §§ 29, 32). The plaintiff in error relies upon that adjudication as decisive of the question of jurisdiction sought to be raised upon this record. Treating the question as one involving

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the jurisdiction of the court, authorities are cited *in extenso* to show that objections to the jurisdiction cannot be waived. But the real objection here is to the form of the remedy, and not to the jurisdiction of the court. The court undoubtedly had jurisdiction, both of the person of the defendant and the subject of the indictment. The mistake on the part of the prosecution was in proceeding by indictment instead of by civil action, and this is the only error appearing in the record. Was it competent for the party indicted to waive his objections to the form of the proceedings? We are of the opinion that it was. A party may waive a constitutional right, and, *a fortiori*, a mere common-law or statutory right. (1 Bish. Cr. Pr., § 422.) A defendant in a criminal proceeding may bind himself indirectly by waiving rights, or directly by agreement. (*Id.*, §§ 407, 428.) Here the defendant not only waived his objections by not insisting upon them at the proper time, but by a direct and positive agreement with the prosecuting attorney. Certainly he ought not to be permitted to come into this court and here for the first time start objections to the form of the proceedings against him. The court, as has already been stated, had undisputed jurisdiction of the subject-matter of the indictment. The defendant submitted himself to its jurisdiction, and allowed judgment to go against him by voluntary confession and consent.

The judgment must be affirmed. The other judges concur.

THE STATE OF MISSOURI, Plaintiff in Error, v. GEORGE SAXAUER,
Defendant in Error.

1. *Criminal law—Indictment—Selling liquor on Sunday—Form of proceeding—Waiver.*—On trial of an indictment for selling liquor on Sunday, defendant, by allowing judgment to go against him by voluntary confession and consent, may waive an objection urged merely to the form of the proceeding—as that it was by indictment and not by civil action. And having waived it in the trial court he cannot raise it for the first time in the Supreme Court. (*State v. Warnke, ante*, p. 451, affirmed.)
2. *Criminal law—Selling liquor on Sunday—Offense may be tried before the Circuit Court.*—Under section 32, page 516, Wagn. Stat., the offense of selling liquor on Sunday is not exclusively cognizable before justices of the peace, but may be tried before the Circuit Court.

Error to St. Genevieve Circuit Court.

John B. Robinson, B. B. Cahoon, Circuit Attorney, and *A. J. Baker*, Attorney-General, for plaintiff in error.

The Circuit Court of St. Genevieve county had jurisdiction of the subject-matter of this proceeding concurrent with justices of the peace. (Wagn. Stat. 516, §§ 29-32.)

Jno. F. Bush, for defendant in error.

The Circuit Court of St. Genevieve county had no jurisdiction of the indictment, or of the offense charged in the indictment. The offense of selling liquor on Sunday was a misdemeanor within the exclusive jurisdiction of justices of the peace in said county. (Wagn. Stat. 516, § 29; *id.* 504, § 35; *State of Missouri v. Huffschtmidt*, 47 Mo. 73.)

CURRIER, Judge, delivered the opinion of the court.

The defendant was indicted in St. Genevieve county, November, 1870, for selling liquor and keeping an open grocery on Sunday, contrary to the statute. (Wagn. Stat. 504, § 35.) He appeared in court and voluntarily confessed the offense and was fined one dollar. An execution, regular upon its face, was issued to carry into effect the judgment. The execution was quashed on motion, and the case is brought here on writ of error.

The case raises substantially the same question which was passed upon by this court in *State v. Warnke*, *ante*, p. 451. The views there expressed will be adhered to. It is unnecessary to repeat them. The further point, however, is made here that the offense charged was exclusively cognizable before a justice of the peace, whatever the form of prosecution. We cannot sustain that view.

The statute under which the indictment was found provides for the punishment of the offense there defined by fine, which shall not exceed \$50. It is then provided (Wagn. Stat. 516, § 29) that the fine may be recovered before a justice of the peace. But the statute further provides (Wagn. Stat. 516, § 32) that Circuit Courts shall have concurrent jurisdiction with justices of the

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peace in the cases embraced within the provisions of section 29 above referred to. The Circuit Court of St. Genevieve county, therefore, had jurisdiction of the offense charged in the present indictment.

The order and judgment of the court below quashing the execution is reversed. The other judges concur.

CENTRAL SAVINGS BANK, Respondent, v. EUGENE SHINE,
Appellant.

1. *Practice, civil — Verdict — Conclusive on questions of fact.*— On questions of fact in law cases, where the evidence is conflicting, the verdict of the trial court is conclusive.
2. *Letter of credit — Loan, notice of — Approval and acceptance — Ratification, effect of.*— If, after a loan is made by a bank on a letter of credit, the writer has information thereof, and with full knowledge approves of and assents to the loan, such approval and assent amount to a ratification, and he will be bound thereby.
3. *Guaranty, offer of — Notice of acceptance necessary to bind guarantor — What notice reasonable as to time a question for the jury.*— Where an offer or proposal is made by letter to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance, in order that the guarantor may know distinctly his liability, and may have the means of arranging his relations with his principal, and may take from him security or indemnity.

In an action against the guarantor, a general averment of notice of acceptance by plaintiff is sufficient, and the question whether it be reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court.

Appeal from St. Louis Circuit Court.

The first, second and third instructions given by the court for the plaintiff were as follows:

“1. That the contract set out in the plaintiff's petition is an absolute undertaking on the part of defendant to pay the plaintiff \$15,000 if the plaintiff would loan that sum to O'Neil & Co.; and if plaintiff did loan said sum to O'Neil & Co. in pursuance of said contract, plaintiff is entitled to recover.

“2. If the court finds that the paper set out in the petition was received by the plaintiff about the 30th of March, 1868, and

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plaintiff accepted the proposition therein contained, and on or about the day aforesaid loaned to O'Neil \$10,000, and was then ready and willing to loan said firm the balance called for in the paper, and so notified said firm; and that plaintiff afterward, on or about the 9th of April, 1868, when required by O'Neil & Co., did loan them \$5,000, the balance called for in said paper; and afterward, to-wit: about the 20th of May, 1868, defendant examined the books of plaintiff, and from said books and other information became aware that plaintiff had loaned said money to said firm, and that with such knowledge he approved of what plaintiff had done in the premises; and that, after the money was loaned to O'Neil & Co. as aforesaid, they became insolvent and failed to pay said money to plaintiff, and that defendant became aware of the insolvency of said firm as soon as plaintiff—then the plaintiff is entitled to recover the sum or sums so loaned to said firm, with legal interest, less the credit stated in the petition.

"3. The court declares the law to be that the written instrument set out in the petition and read in evidence constitutes an undertaking on the part of the defendant to pay plaintiff \$15,000 if plaintiff would loan to O'Neil & Co. that sum; and that if plaintiff did, in pursuance of said undertaking and on the faith thereof, loan to O'Neil & Co. the said sum, then defendant became and is liable to plaintiff therefor, less the payment made thereon."

T. T. Gantt, for appellant.

I. The writing dated March 13, 1868, is a proposa to guaranty the plaintiff in a certain event, and upon the face of it the writer declares his uncertainty whether his proposal will be accepted. The plaintiff was bound in accepting it to give the guarantor reasonable notice of its acceptance, and in the absence of such notice the guarantor is discharged. (*Douglass v. Reynolds*, 7 Pet. 113; 10 How. 461; *Smith v. Anthony*, 5 Mo. 504; *Childs v. Rankins*, 9 Mo. 673; *Craft v. Isham*, 13 Conn. 28; *New Haven County Bank v. Mitchell*, 15 Conn. 217; *Lowrie v. Adams*, 22 Verm. 168; *Mussey v. Raynor*, 22 Pick. 223; *Thomas v. Davis*, 14 Pick. 353; 1 Mason, 340; *Norton v. Eastman*, 4 Greenl. 521; *Tuckerman v. French*, 7 Greenl. 115;

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Babcock v. Bryant, 12 Pick. 133.) The list might be much prolonged, but it is deemed merely useless to do this.

II. The guaranty is to be for an advance, by the plaintiff, of additional cash, over and above what has been already advanced by the plaintiff to O'Neil & Co., and this cannot be extended to cover the renewal of an advance already made to O'Neil & Co. by the plaintiff.

III. The proposal is to guaranty this advance to O'Neil & Co., and this cannot be construed to cover an advance to O'Neil alone, no matter how intended by the plaintiff and O'Neil. (Farmers' Bank v. Bayless, 35 Mo. 428; Allison v. Rutledge, 5 Yerg. 193; Grant v. Naylor, 4 Cranch, 224; Bellairs v. Ebsworth, 5 Campb. 52; Weston v. Barton, 4 Taunt. 673; Simson v. Cooke, 8 Moore, 588; Ripling v. Turner, 5 B. & Ald. 261; Russell v. Perkins, 1 Mason, 368.)

IV. The failure to notify defendant of the non-payment of the loan at maturity in June, 1868, and the renewal of the loan (O'Neil being then solvent) discharged the defendant. (Reynolds v. Douglass, 12 Pet. 497; Louisville Manuf. Co. v. Welch, 10 How. 491.)

V. The renewal of the loan on the 1st and 11th of June, 1868, without Shine's consent, discharged him.

VI. The failure to give to Shine the information requested on the 24th of June, 1868, and the direction of the plaintiff to its cashier not to answer Shine's letter of that date, estops the bank to claim that the facts were otherwise than as supposed in that letter.

S. Reber, for appellant.

It is settled by the weight of authority that where the debt to be guarantied is ascertained and agreed on by previous negotiations between the parties, and the guaranty is given of such a debt, no notice of the acceptance of the guaranty is necessary, because the guarantor has such notice at the time he gives his guaranty. But where the proposal is to guaranty a debt to be created in the future, and which is not already agreed on between the parties, the proposal must be accepted by the guarantee by

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notice to the guarantor to that effect. Until this is done there is no bargain struck—no *aggregatio mentium*. It is illusory to say that the guarantee accepts the undertaking of the guarantor by simply giving the credit for which the guarantor proposed to become responsible. The doctrine that notice of the acceptance of the guaranty is necessary in the cases above mentioned is adopted as the law of this State in the cases cited from 5 Mo. and 9 Mo. In the latter case Judge Scott dissents, but on the ground that the defendant's engagement was an original and not a collateral one. (See 7 Mo. 682.)

It is just as important to the guarantor to have notice of acceptance as it is for the drawer of a bill to have notice of its non-payment.

The cases in the United States reports are all in conformity with the Missouri cases. (2 Am. Lead. Cas. 79.) As illustrating the difference between a guaranty and a proposal to guaranty, see *Howe v. Nichols*, 22 Me. 175; *Eaton v. Shaw et al.*, 2 H. & Gill, 22; *Allen v. Pike*, 3 Cush. 243; *Walker v. Forbes*, 25 Ala. 139; *Fay v. Hall*, *id.* 709; *McDougal v. Calef*, 34 N. H. 534; *Beebe v. Dudley*, 26 N. H. 249.

Sharp & Broadhead, and *J. R. Lackland*, for respondent.

I. The contract of appellant is a primary, direct promise to the bank that he will be responsible to it for the \$15,000—not a conditional or collateral one, nor a guaranty for payment to be made by O'Neil & Co., or any third person. O'Neil & Co. did not apply to respondent for the loan of the money; they did not agree to repay the money. No contract was made or existed between the bank and O'Neil & Co., consequently appellant's undertaking was not and could not be collateral or secondary, for there was no agreement to which it could be so.

The only true meaning and construction of appellant's contract is that he primarily applied for the loan of the money to be made to O'Neil & Co.; he promised, not that O'Neil & Co. should pay it and he would be responsible that they should, but that he himself would pay it to the bank. The only contract made with the bank was appellant's contract, that if it would

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loan the money he would pay the amount to it. To secure such repayment by him he pledged as collateral security for his performance a note held by him on Walker for a like amount. There is no provision or requirement that O'Neil & Co. should agree to pay or become liable for the money to the bank, or become a principal debtor, or for appellant to be secondarily or collaterally liable for them, or guarantor for payment by them. When this paper was delivered to and received by the bank, and the money loaned thereon, appellant became at once directly bound as original contractor or debtor, and no notice was necessary to complete his liability. (Allen v. Rightmore, 2 Johns. 364; Ridgeway v. Day, 13 Penn. 208; 37 Mo. 424; 26 Me. 358; 16 Me. 257; 37 N. H. 539; 6 Conn. 81; Mason v. Pritchard, 2 Campb. 436.)

II. In the cases in which undertakings have been held to be guaranties, when, upon a fair construction of the terms of the undertaking, the party bound himself to be responsible for goods or property sold to another, and not a collateral undertaking for performance by another of the terms of some agreement of such other person, it is held to be an absolute guaranty; and when acted upon according to its terms, the liability of the guarantor is fixed. No notice of acceptance, or that it has been acted upon, or will be acted upon, or of default of principal debtor, is necessary. (Powers v. Bumcratz, 12 Ohio St. 273; 8 Gray, 211; 36 Verm. 617; 15 Ind. 45; 9 Wis. 316; 28 Verm. 160, 175; 26 Barb. 63; 1 Sneed, Tenn., 158; Hill & Denio, 237; 3 Sneed, 87; 1 Wms., Verm., 482; 2 Gilch., Mich., 504; 3 Comst., N. Y., 203; Sanders, 563; 19 Wend. 557; 26 Wend. 425; 2 Barb. 51; 6 Conn. 315; 12 Sm. & M. 395; 7 Ired. 384; 7 Blackf. 562; 20 Johns. 367; 7 Conn. 523; 4 Day, 444; 7 Greenl. 186; 11 Verm. 444; 3 Verm. 301; 1 Miles, 276; 1 McMullen, 76; 15 Conn. 406; 6 Hill, 543; 24 Wend. 82.)

III. Even if the undertaking sued on could be construed as strictly and technically a guaranty for O'Neil & Co., and for payment by them, and that notice of its being acted upon and of the money loaned, and notice of default of payment by O'Neil & Co., should have been given to appellant, yet the averments in the

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petition and the evidence on those points are amply sufficient. After averring the facts, it is alleged that appellant had due notice of them; and the evidence shows that he was in St. Louis in two months after the money was loaned, and well knew and approved all that had been done.

In cases of undertakings of guaranty, where notice has been held to be necessary, it is held that it need not be immediate, but that if notice or information is received by the guarantor in reasonable time it is sufficient, and the notice need not be formal or proven by direct evidence. If information is acquired by the guarantor, this is sufficient, and it may be inferred from circumstances; and the notice or information is within a reasonable time if it be before any actual damage (by reason of the want of it) has come to the guarantor. (15 Ind. 144; 34 N. H. 534; 28 Verm. 160; 1 Wms., Verm., 482; 10 How., U. S., 461; 2 Me. 79; 9 Mo. 673; 11 Verm. 444; 4 Humph. 303; 1 Sto. 22.)

The two cases passed upon by the courts of this State (5 Mo. 504 and 9 Mo. 673) have little or no weight. They were poorly considered, and are in apparent conflict with the great weight of authorities. They are also both cases of secondary or collateral contracts—secondary and collateral to the primary contracts of the original contracting parties—guaranties for performance by the principal contracting parties of certain agreed terms of their contracts—technical guaranties; while the case before us presents the original contract of appellant, for himself—for no one else; for no one else had made a contract for which he could become guarantor. He, and he alone, was principal and the only contracting party.

WAGNER, Judge, delivered the opinion of the court.

This cause was tried on a second amended petition, in which the plaintiff states as its cause of action that Peter O'Neil and Francis Doyle were partners under the name of O'Neil & Co., and that on the 13th of March, 1868, Joseph O'Neil being president of the plaintiff, the defendant wrote to him on that day from Ireland as follows: "Hearing from P. O'Neil and Mr. Doyle that they could use advantageously some additional cash over

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and above the amount already had of your bank, and being desirous to promote their interests and enable them to carry on their business efficiently, I will thank you to submit to your board that if they will lend O'Neil & Co. \$15,000 I shall hold myself responsible for that amount, and will leave with you as collateral security the note and mortgage of Isaac Walker, which is at present in your vault, for a like sum (say \$15,000). If the Central cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere." The petition also states that this paper was delivered to the said president on the 30th day of March, 1868, by him on the same day laid before the board of directors and by them accepted; that by this writing defendant promised the plaintiff that if it would loan to O'Neil & Co. \$15,000 he (defendant) would be responsible for that amount; that thereupon, "on the faith thereof, plaintiff lent to O'Neil & Co., in the ordinary and usual manner of such loans, \$15,000, of which defendant afterward had due notice; that of this sum \$10,000 was lent on the 30th of March, 1868, for sixty days, and the balance on the 9th of April, 1868, for sixty days; of all of which the defendant afterward had full knowledge, and agreed and assented thereto and approved thereof."

The answer admitted the writing set out in the plaintiff's petition, but denied that the plaintiff at any time gave to the defendant notice of the acceptance of the proposal, or that the proposal was accepted; denied, further, that plaintiff made to O'Neil & Doyle any loans or advances on the faith of the writing as stated and set forth, or that he had any notice of them from any source prior to the commencement of this suit, or that he at any time assented to or approved the same.

To this answer there was a replication, which simply denied that defendant made a proposal in writing to guaranty plaintiff in case it would make any loan to O'Neil & Doyle, and that the only writing or contract made by the defendant relating to the loan, was the agreement mentioned in the petition. The cause was tried by the court sitting as a jury, and the verdict and judgment were rendered for the plaintiff.

Whether the loans were made and in what manner were ques-

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tions of fact, and the verdict and finding of the court below in that regard is conclusive here. So far as refusing instructions asked for the defendant is concerned, we see no ground for interference. Those already given at his instance covered the material points in the case and were sufficiently favorable.

The second instruction given for the plaintiff is, I think, unobjectionable. If, after the loan was made, defendant had information thereof, and with full knowledge approved of what the plaintiff had done in the premises and assented thereto, this would amount to a ratification, and he would be bound thereby. But under the pleading the main issue presented is as to the real character of the writing addressed by the defendant to the plaintiff. The view of the plaintiff is that it is an original, primary undertaking—an absolute promise, binding the defendant without any notice of acceptance. On the other hand, the defendant contends that it is nothing more than a guaranty, and that to impose any obligation on the defendant, notice of acceptance was indispensably necessary.

The first and third instructions given by the court for the plaintiff proceed upon the theory that the writing was an original promise, and so treat it, and declare that if the plaintiff loaned the sum to O'Neil & Co. in pursuance of the writing, then it was entitled to recover. The instructions wholly dispense with any notice of acceptance to be given to the defendant, and hold the writing to be a binding contract as soon as acted upon by the plaintiff, whether the defendant was ever apprised of that fact or not.

There is a marked difference between an overture or proposition to guaranty and a simple contract of suretyship. The one is a contingent liability, the other is an actual undertaking. The surety is bound with his principal as an original promisor; he is a joint debtor with his principal from the very inception of the agreement, and his obligation continues until full payment is made. An indulgence by the creditor will not absolve him, for his liability is absolute, and he is bound to know of his principal's default. But the contract of a guarantor is his separate, independent contract. It is not a joint engagement with the

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principal to do a thing. It is in the nature of a warranty that some one else shall do a certain thing or act, and the guarantor is responsible only for the default or failure of his principal. A surety being a joint contractor, may be sued with his principal; a guarantor cannot be.

The great weight of authorities, including the decisions in this State, establish the proposition that, as the original contract with the principal is not the contract of the guarantor, the creditor is bound to give him notice if he intends to hold him responsible. The counsel for the plaintiff have cited cases to show that no notice is necessary, and that the guarantor is bound whenever the creditor receives his proposition and acts on it; but the law of this State is settled otherwise. That the paper addressed by the defendant to the plaintiff was simply an overture or proposition, instead of a direct or absolute undertaking, seems to be sufficiently plain. He says, in substance, that hearing that O'Neil & Co. could use some additional cash over and above the amount already had of the plaintiff, he would thank the president of the plaintiff to submit to the board if they would lend the firm \$15,000, and he would hold himself responsible for that amount; but if the plaintiff could not conveniently make the advance, he should feel obliged to procure it elsewhere. This was nothing but the submission of a proposition. The defendant did not know whether it would be accepted or not, and until he was notified of its acceptance he obviously could not tell anything about the nature or certainty of his liability. This, it appears to me, is the fair and correct interpretation of the instrument; and the decisions in this State and in other courts, which we have followed, have so construed similar writings, and held that notice of acceptance was necessary to fix the responsibility of the guarantor.

In the case of *Smith v. Anthony*, 5 Mo. 504, Smith addressed to Anthony the following letter:

"COL. WM. ANTHONY: Dear Sir—Wm. Mitchell, Jr., will probably call on you to purchase your horse; and should you conclude to sell, you can do so. Take his note, and I will be responsible for the payment on his return.

"Respectfully,

ZENAS SMITH."

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Anthony sold Mitchell his horse, and Mitchell took him to Alabama, and returned; and failing to make payment, suit was brought against Smith, and it was held that before Anthony could recover he must prove that he gave Smith notice that he had sold on the faith of the guaranty, and that he looked to him for payment.

In *Rankin v. Childs*, 9 Mo. 665, McCourtney applied to Rankin to purchase lumber for building a ferry-boat. Rankin refused to credit him without security. McCourtney mentioned the name of Childs as security, and he was accepted as sufficient. A few days after McCourtney presented a bill of the lumber in Childs' handwriting, at the foot of which was written:

"Messrs. Rankin will furnish the above bill as soon possible, and I will order what more I may want for my boat in a short time.

JAMES MCCOURTNEY."

"I hereby guaranty the payment of the above bill. January 29, 1842.

WM. CHILDS."

It was in evidence that the lumber was delivered, and that, while the boat was being built, Childs was frequently present as a visitor but took no part in the matter. In an action against Childs, it was held that his contract was not a direct promise but a mere guaranty, and to hold him liable, notice should have been given of the acceptance of the guaranty.

In *Douglass v. Reynolds*, 7 Pet. 113, a letter was addressed by the defendant to the plaintiff in the following words: "Gentlemen—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance, or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do bind ourselves severally and jointly to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so." It was held that this was a guaranty, and that to hold the guarantors liable, they were entitled to notice of its acceptance.

This is now and has long been the firmly established doctrine in the Supreme Court of the United States. (*Douglass v. Reynolds*, *supra*; 12 Pet. 497; *Russell v. Clark*, 7 Cranch, 69; *Edmondson v. Drake*, 5 Pet. 624; *Lee v. Dick*, 10 Pet. 482.)

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In Maine the following instrument was construed in the same way: "Messrs. W. & G. Tuckerman: Gentlemen—For the bill of goods which Mr. Charles B. Prescott bought of you on the 6th inst., I hold myself responsible to you for payment agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell to him, provided the amount does not exceed \$500." This was decided to be a guaranty, and as the plaintiff had not given notice of its acceptance in the first instance, nor of the delivery of the goods under it subsequently, he could not succeed in his action. (*Tuckerman v. French*, 7 Me. 445.) A similar decision was made in the case of *Bradley v. Cary*, 8 Me. 214.

The question was decided in the same way, on essentially the same state of facts, in *Craft v. Isham*, 13 Conn. 28; *Oaks v. Miller*, 13 Verm. 116; 16 Verm. 63; *Lowry v. Adams*, 22 Verm. 166; *Babcock v. Bryant*, 12 Pick. 133; *Mussey v. Raynor*, 22 Pick. 233. In all these cases the courts hold that notice of acceptance is an essential element, without which a guaranty of future advances cannot rise higher than a mere proposal or offer, nor ascend to the rank of a binding agreement.

Mr. Parsons sums up the rule, as deduced and extracted from the weight of authority, that where there is a guaranty for future operations, perhaps for one of uncertain amount, and offered by letter, there should then be a distinct notice of acceptance, and also a notice of the amount advanced upon the guaranty, unless that amount be the same that is specified in the guaranty itself. (2 Pars. Cont., 5th ed., 13.)

The reason which underlies the principle of notice is that the guarantor may know distinctly his liability, and have the means of arranging his relations with the party in whose favor the guaranty is given, and take from him security or indemnity. Whilst New York and some few of the other States have decided that notice of acceptance is unnecessary to bind the guarantor, still the contrary doctrine is ruled in our own courts and the national courts, and a large majority of the courts of other States.

Messrs. Hare & Wallace, in their edition of *Leading Cases*, say that notwithstanding the objections which may be made to the

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doctrine which makes notice essential to complete the obligation of prospective and contingent guaranties, it has been transplanted from the courts of the United States into many of the State tribunals, and is now well-settled law in New England, Pennsylvania, Ohio, Missouri, Kentucky, Alabama, and some other parts of the Union. (2 Am. Lead. Cas., 4th ed., 73.)

It was formerly held that notice of an intention to accept and act under the guaranty was an obligation of the commercial rather than the common law, and that it must be given immediately, or at all events without unnecessary delay. But the cases of *Douglas v. Reynolds*, *supra*, and *The Louisville Manuf. Co. v. Welch*, 10 How. 461, are limited to a declaration that notice must be given within a seasonable or reasonable time after what is called acceptance. And the latter decision establishes not only that a reasonable notice of what is done under the guaranty will be sufficient, but also that no delay in giving it will be a bar to the action unless it is productive of some injury to the guarantor.

The better opinion, I am inclined to think, is that a general averment of notice is sufficient; and the question whether it be reasonable under all the circumstances of the case is one of evidence, which should be left to the jury under proper instructions from the court. (*Lawrence v. McCalmont*, 2 How. 426; *Louisville Manuf. Co. v. Welch*, *supra*; *Williams v. Stanton*, 5 Sm. & M. 347; *Walker v. Forbes*, 25 Ala. 139.)

For the error of the court in giving the first and third instructions for the plaintiff, the judgment must be reversed and the cause remanded. The other judges concur.

Shine having died since the submission of this cause, the clerk will enter up the judgment as of the last term *nunc pro tunc*.

State of Mo. ex rel. Cir. Att'y Tenth Jud. Cir. v. C. G. & State Line R.R.

THE STATE OF MISSOURI *ex rel.* CIRCUIT ATTORNEY OF THE
TENTH JUDICIAL CIRCUIT, Appellant, v. THE CAPE GIRARDEAU
& STATE LINE RAILROAD, Respondent.

1. *Constitution, what acts under shall be declared invalid.*—The Supreme Court of this State will never declare an act of the Legislature invalid unless in their judgment its nullity and invalidity are placed beyond a reasonable doubt. It is presumed that they are constitutional unless they manifestly infringe on some of the provisions of the constitution.
2. *Constitution—Special legislation—Amendments to laws passed under old constitution.*—The act of December 31, 1859, incorporating the Cape Girardeau & State Line Railroad, was not void under article IV, § 27, of the present constitution, as being an act of special legislation. That clause was obviously intended to have a prospective operation, and to apply only to laws passed after the adoption of the constitution. And the amendment of February 18, 1869, permitting the company to build the road to the State line through or near Bloomfield, was valid under section 3, article XI, of the constitution, which section empowered the Legislature to make subsequent amendments to charters already in operation.

Appeal from Cape Girardeau Circuit Court.

L. Houck, for appellant.

I. The Legislature has no power to amend a special act passed under the old constitution. (a) The object of the constitutional provisions (art. IV, § 27; art. VIII, § 4) was to prevent and inhibit special legislation. If this is so, then to say that the Legislature may not pass an act to incorporate, but may pass an act to amend an act of incorporation in existence, would make this provision of the constitution practically amount to nothing; for if the Legislature may amend, it may to the extent of passing an entirely new law, except as to one section. Or it may at one session amend one half, and at a subsequent session the other half; and thus the plain and positive prohibition of the fundamental law would be evaded. If the power to amend is not withheld, there is no limit to the power. (*Ex parte Pritz*, 9 Iowa, 33; *Davis et al. v. Woolnaugh*, *id.* 106; *Hetherington v. Bissell et al.*, 10 Iowa, 147; *Baker et al. v. Steamer Milwaukee*, 14 Iowa, 217; *Atchison v. M. & C. R.R. Co.*, 15 Ohio St. 35; *McGregor v. Baylies*, 19 Iowa, 46; *Atchison v. Bartholow*, 4 Kan. 148.)

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II. The amendment of the eighth section of the original act incorporating the Pilot Knob, Cape Girardeau & Belmont Railroad Company is a special law. (Blackst. Com. 86; State *ex rel.* Home v. Wilcox, 45 Mo. 465; Dwarris on Stat. 465.)

III. A general law can be made applicable providing for the amendment of charters (Gen. Stat. 1865, p. 331), and the courts can determine whether such a general law can be made applicable.

IV. Even supposing this power of amendment to be vested in the Legislature, it does not extend further than to acts merely curative in their nature. The act of December, 1865, is not curative but rather creative. (Ang. & Ames on Corp., 9th ed., § 537 *et seq.*) The original purpose of the corporation was absolutely and entirely abandoned, and with this abandonment of its original aim and object it died. Under the guise of an amendment, however, it is sought to inject into the defunct concern a new existence. In effect, a new corporation is created by a special act. An amendment effecting this is certainly not curative but creative, and therefore a special law and within the constitutional inhibition.

Thos. C. Fletcher, for respondent.

I. The act of December 31, 1859, and the act amendatory thereof, passed February 18, 1869, were properly pleaded and constitute a complete defense to the proceeding. (Sess. Acts 1859-60, pp. 77, 429.)

II. The Legislature had power to pass an act amendatory of an act existing at the adoption of the constitution. (Const. Mo., art. XI, § 3.)

III. The amendment does not embrace any of the subjects in reference to which the constitution prohibits special legislation, either in terms or by implication. (Const. Mo., art. IV, § 28.)

IV. The Legislature had the power, it not being denied in the constitution, either expressly or by necessary implication. (Sears v. Cottrell, 5 Mich. 258.)

V. The constitution clearly confers the power upon the general assembly to give its assent to such requests by corporations as the one contained in the act of 1869. (Const. Mo., art. VIII, § 2.)

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VI. The appellant having elected to abide by his demurrer in the court below, must abide by it here, and the questions raised by the demurrer are the only ones to be considered now. The only cause of demurrer assigned is that the act of 1869 is unconstitutional because it is a special act.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a *quo warranto* by the circuit attorney of the Tenth Judicial Circuit, to require the Cape Girardeau & State Line Railroad Company to show by what warrant or authority it claimed to have and exercise the franchises of a railroad company. The answer stated an incorporation by an act of the Legislature, approved December 31, 1859, by which the company was chartered, with the privilege of building a railroad from Cape Girardeau to Belmont, and an amendment to said charter, passed February 18, 1869, by which the company was, at its request, permitted to build its road to the State line, through or near Bloomfield.

There was a demurrer to the answer. It was heard and overruled. Plaintiff elected to abide by the demurrer, and judgment was given for the defendant. The only question presented by the record is whether the act of February 18, 1869, amendatory of the act of incorporation of the company, is unconstitutional and void, as being of a class of special legislation which the constitution prohibits the Legislature from enacting.

In some of the States where a constitutional provision exists prohibiting the Legislature from passing special enactments, it is held that a law cannot be amended by a special act, but that a general act must be framed applicable alike to all cases, which the body or corporation seeking the advantage of the law must avail itself of. In other States a different construction has been pursued. We know that the Legislature of this State has proceeded upon the theory that the prohibitory clause in the constitution did not extend to amendments to laws in force prior to its adoption.

When courts are called upon to pronounce the invalidity of an act of the Legislature, passed with all the forms and ceremonies requisite to give it force, they always approach the question

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with great caution, and view it with the most careful and attentive deliberation, and never declare a statute void unless in their judgment its nullity and invalidity are placed beyond a reasonable doubt. No rule of construction is better established, both upon principle and authority, than that acts of the Legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In cases of doubt, every possible presumption not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the act.

The section in the State constitution inhibiting the passage of special laws, designates and enumerates certain specific acts on which a complete prohibition is placed, and then concludes as follows: "The general assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable." (Const., art. iv, § 27.)

Whether a general law could be made applicable, and answer the purpose of amending these charters, is perhaps a question of not very easy solution. Be that as it may, the clause was obviously intended to have a prospective operation, and apply only to laws passed after the adoption of the constitution. Those who advocate the stringent interpretation that a prior law cannot be amended by a special act, seem to have overlooked a very important provision of the State constitution.

In article XI, section 3, it is declared that "all statute laws of this State now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be *amended* or repealed by the general assembly." In this section the constitution makes express provision and clearly delegates the power to the Legislature to amend all laws in force prior to the time the constitution went into operation. As this charter was granted previous to that time, I think it was properly subject to amendment by the Legislature.

Judgment affirmed. The other judges concur.

ROBERT A. MAY, Appellant, v. ROBERT F. LUCKETT, Respondent.

1. *Landlord and tenant — Landlord in possession after abandonment by tenant — Claimant must resort to his action, and cannot intrude without it.*— When a tenant leaves, either at the end of the term or by a surrender of the lease, the landlord comes into sole possession and is possessed of the premises, although not personally present. And it is not the constructive possession alone arising from title, but a real possession arising from his relation of landlord, had when he put the tenant in, held through the tenant, and continued and become exclusive at the termination of the tenancy, and until he has time by his acts to indicate his intentions in regard to the possession. *Semble*, that no one whose claim is *in invitum*—as a purchaser of the premises at an execution sale—has the right to enter without first resorting to his action, giving the occupant the advantage of possession and the right to contest the claim; but that the rule is different in case of a voluntary grant by the landlord. (*Vide Pentz v. Kuester*, 41 Mo. 447.)

Appeal from St. Charles Circuit Court.

H. C. Lackland, for appellant.

Defendant was not plaintiff's tenant, nor did he attorn to his grantee. Hence the case of *Pentz v. Kuester* has no application. Such attornment is essential; otherwise the possession remains unchanged in the landlord.

In the case at bar the possession was in plaintiff when defendant entered, and the entry was trespass. (*Forcible Entry and Detainer Act*, §§ 1, 16, 36.)

J. A. Kellar, for respondent.

I. Defendant's entry was made with the knowledge and consent of plaintiff's tenant.

II. Plaintiff's tenant had a legal right to attorn to plaintiff's grantee.

III. As between landlord and tenant, possession cannot be in both at the same time. (*Burns v. Patrick*, 27 Mo. 434; *McCartney's Adm'r v. Alderson*, 45 Mo. 35.)

IV. It is not sufficient that the entry is unlawful. It must be unlawful against the party who complains. Plaintiff in this case must himself have been disseized.

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V. The deed of the sheriff being regular in form is valid for all purposes and amounts in law to the act of the appellant himself. That deed divested him of all right of property in the land, and he not being in actual possession of the land, could certainly not be said to be in the constructive possession of the land. The premises were vacant, and the defendant could enter lawfully if he could do so peaceably. (Wagn. Stat. 61, art. 1, §§ 1, 32; Packwood v. Thorp, 8 Mo. 636.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff rented certain premises to one Mrs. Pulliam, and while she was in possession they were sold upon execution against him and bid in by defendant's grantor. An effort was made to induce Mrs. Pulliam to attorn to defendant, but refusing to do so she abandoned the premises, leaving the key in the door, and within twenty-four hours the defendant entered. The plaintiff was a non-resident, and when advised of the transaction brought his action for unlawful detainer. The case was appealed, and in the Circuit Court the defendant was permitted to prove the execution, sale and deeds; and the court holding that the plaintiff was dispossessed before defendant's entry, and the latter lawfully in, gave him but judgment, from which the former appeals.

There is no dispute as to the evidence, only as to its legal effect. The tenant abandoned the premises and surrendered possession to the landlord. She could, by simply leaving so as to terminate her tenancy, surrender to no one else, nor did she attempt to give the defendant possession. Although the dispossession of the tenant during his term is not the dispossession of the landlord so as to enable him to bring suit, inasmuch as he has no right of entry until the term ends, and the tenant alone is injured by its invasion; yet when the tenant leaves, either at the end of the term or by surrender of the lease, the landlord comes into sole possession, and he must be considered as possessed of the premises, though not personally present. And it is not the constructive possession alone arising from title, for that is not sufficient to maintain this action, but a real possession arising from his relation of landlord, had when he put the tenant in, held

through the tenant, and continued and become exclusive at the termination of the tenancy, and until he has time by his acts to indicate his intentions in regard to the possession. "Can it be pretended that an owner of land loses his actual possession because, after the expiration of a tenant's term, and perhaps before the owner can find another, some intruder enters and takes possession? Whether the intruder be a mere trespasser or have good title makes no difference." (Warren v. Ritter, 11 Mo. 354.) If the landlord when not present were held to be out of possession when the tenant has left, so that a stranger or adverse claimant could enter and hold until ejected by proof of title, the greatest frauds might be practiced and this beneficent statute be deprived of its chief efficacy.

If the defendant entered upon the plaintiff's possession without consent, he has no defense in this action. His right cannot be considered, and his deeds were improperly admitted in evidence. A purchaser upon execution sale must, like any other claimant, resort to his action, giving the occupant the advantage of possession and the right to contest the claim. (Spalding v. Mayhall, 27 Mo. 377.)

The doctrine of Pentz v. Kuester, 41 Mo. 447, does not reach this case. It is there held that a tenant may attorn to a purchaser from the landlord, so as to defend against him under the statute; and it does not matter whether the sale be by his deed, or otherwise by his act—as in that case, under his petition for partition, the court held a sale under such petition not to be *in invitum* like a sale upon execution, but the act of the party, and based the decision upon sections 36 and 40 of the Forcible Entry and Detainer act. The right thus to attorn is given rather by the spirit than by the letter of those sections, for their object was first to enable heirs, grantees, etc., to avail themselves of the dispossession of their ancestor, grantor, etc., and to bring the action as though they had themselves been dispossessed (McCartney v. Alderson, 45 Mo. 35), and also to enable the heirs, grantees, etc., of the landlord to avail themselves of an unlawful detainer by a tenant holding over. If the landlord's grantee is enabled to dispossess the tenant, they are placed in direct relation to each

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other, and it is but reasonable that the tenant should be enabled to attorn to him, as is held in *Pentz v. Kuester*.

The statute of 1865 was held not to embrace sales *in invitum* and create a new rule in relation to the rights of purchasers under executions. If the landlord makes a voluntary grant he agrees to give possession, and the attornment but carries out his will, but if the grant be involuntary it is against his will; and there is no reason why a different rule in relation to possession by purchasers at execution sales should prevail, when the execution defendant has leased the premises and where he himself occupies them.

In the case at bar there was not only no voluntary grant indicating a surrender of possession, but there was no attempt at attornment by the tenant. It was a naked intrusion or contrivance to get possession and throw the plaintiff upon his proof of title. One of the objects of the act is to prevent such practices, and enable parties to hold possession until their rights are determined.

The other judges concurring, the judgment will be reversed and the cause remanded.

STATE OF MISSOURI *ex rel.* NATHAN M. ZIMMERMAN, Defendant
in Error, *v.* THE JUSTICES OF BOLLINGER COUNTY COURT *et al.*,
Plaintiffs in Error.

1. *Mandamus will issue against county judges for payment of warrants drawn on swamp land funds.*—In proceedings before the Circuit Court for *mandamus* against the judges of the County Court, requiring payment of warrants ordered by them and drawn on the "swamp land" fund, where the return sets up no equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the writ will issue; and it cannot be objected that no judgment had been first obtained against the County Court on the claim evidenced by the warrants; for being drawn on a special fund, such judgment could not be obtained.

Were the proceedings appealable to the Circuit Court, *mandamus* would not lie; since that remedy is afforded only when others fail. But being an attempt to induce the payment of claims already audited, there was nothing in regard to which an appeal would lie.

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Error to Bollinger Circuit Court.

B. B. Cahoon, for plaintiffs in error.

I. If the County Court, by mistake or otherwise, audited an illegal claim, payment cannot be compelled by *mandamus*, for courts will leave the parties to such remedies as they may have by ordinary proceedings. (48 Mo. 230; *The People ex rel. Merritt v. Lawrence*, 6 Hill, 244; *The People v. Edmonds*, *id.* 472; *The People v. Stout*, *id.* 350; *Baker v. Johnson*, 41 Me. 15.)

II. The court, in effect, gave a particular judgment and compelled an inferior court to reverse its decision where it had once acted. *Mandamus* will not issue to do either. (*Dunklin County, etc., v. District Court of Dunklin County*, 23 Mo. 454; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 224.)

III. In making the orders in relation to the warrants—if any were made—and in granting the appeal, the County Court acted judicially. (In the *Matter of the Saline County Subscription*, 45 Mo. 53-4; *Wagn. Stat.* 442, § 22; *id.* 415-16, § 36-8; *id.* 432, § 2; *Boone County v. Corlew*, 3 Mo. 12.) And the bringing by relator of the case by appeal from the County Court waives all objection to the regularity of the appeal. (*Boone County v. Corlew*, *supra.*) But *mandamus* will lie only where the act to be done is purely ministerial, and nothing like judgment or discretion is left to the officer in its performance. (*Williams v. Court of C. P.*, 27 Mo. 225; *Dunklin County v. District Court*, 23 Mo. 454; *United States v. Guthrie*, 17 How. 284; 6 How. 92; 12 Pet. 524; 14 Pet. 497; 5 Ohio, 529; 14 Ohio, 322; 8 Ind. 345.)

IV. *Mandamus* will not be awarded except where the petitioner has a specific right and no other specific remedy. (*Becker v. St. Louis Land Commissioner*, 30 Mo. 111; *Williams v. Court of C. P.*, 27 Mo. 227; *State ex rel. Bornefeld v. Howard County Court*, 39 Mo. 317; *Phelps County v. Bishop*, 46 Mo. 70; *State ex rel. Bornefeld v. Rombauer*, 46 Mo. 156; 23 Mo. 454; 13 Pet. 279; 6 Iowa, 656; *Tapp. on Mandamus*, 64.) In this case the specific remedy was either (a) by appeal, which was taken

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(Wagn. Stat. 442, § 22; *id.* 415-16, §§ 36-8; *id.* 432, § 2), or (b) by an action at law upon the warrants. (Phelps County v. Bishop, 46 Mo. 70; Marion County v. Phillips, 45 Mo. 77-8.) The county is shown to have sufficient property to satisfy the execution.

V. The indebtedness, according to relator's statement, consisted of non-negotiable county warrants, such as are described in the statute (Wagn. Stat. 415, §§ 31, 33, 34). Such warrants represent but simple contract obligations. (State *ex rel.* White v. Clay County, 46 Mo. 234.) Before being reduced to judgment, relator is not entitled to peremptory *mandamus* to enforce their collection. (*Id.* 236; Cox v. City of Lyons, 17 Iowa, 7.)

Nalle & Noel, for defendant in error.

Mandamus here is the only remedy. The appeal taken by relator was not a remedy. No appeal would lie from such a proceeding.

BLISS, Judge, delivered the opinion of the court.

The relator presented a petition to the Circuit Court of Bollinger county for a writ of *mandamus* directed to the county judges, to require them to provide for the payment of certain county warrants ordered by them and drawn upon the swamp land fund, and representing that by a proceeding in garnishment the warrants had been placed in the hands of the sheriff for the use of the relator; that he had presented them to the treasury but their payment was refused, for the reason that the County Court had otherwise disposed of the fund, and had directed him not to pay them; that he had applied to the County Court to provide funds to be placed in the treasurer's hands for the purpose of paying the warrants, but the court refused to do so, and that the county has ample funds applicable to their payment. The return shows no good reason why these warrants are not paid; does not show that they were improperly issued, or that their amount was not due; but sets up several rather evasive excuses for the action of the court, as that some of the records of the County Court had been destroyed, and respondents did not know whether the war-

State of Mo. ex rel. Zimmerman v. The Justices of Bollinger Co. Court et al.

rants were regularly indorsed, and the petitioner had appealed from the refusal to provide for their payment.

If the application thus refused were appealable, and the merits of the case were so involved in the question as to afford relief to which the petitioner is entitled, then it would be a good reason why a *mandamus* should not issue; for remedies of this kind are only afforded when all others fail. But it is not appealable. Appeals are statutory, and the general provisions (Gen. Stat. 1865, ch. 136, § 2; Wagn. Stat. 432) giving the Circuit Court appellate jurisdiction over County Courts do not provide for appeals proper, unless there has been other specific legislation in regard to it. (Snoddy v. Pettis County, 45 Mo. 361.) If this application had been a presentation of a demand against the county, a refusal to allow it could have been appealed from, for such appeal is expressly provided for by statute. (Gen. Stat. 1865, ch. 38, § 36; Wagn. Stat. 415.) The refusal is not a judgment, yet the statute has provided this mode of bringing the county into the Circuit Court without process, of which a claimant may avail himself if he chooses. (Reppy v. Jefferson County, 47 Mo. 66.) But being an attempt to induce the County Court to provide for the payment of claims already audited, there was nothing in regard to which an appeal would lie.

Were these general warrants, for which the county was liable, we should first require that the claim they evidence be reduced to judgment. (State v. Clay County, 46 Mo. 231.) But they are drawn upon a special fund, and the county cannot be sued in an ordinary action, and thus that remedy is unavailable; or if the return had set up any equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the holder would not be entitled to the benefit of this extraordinary remedy. (The State v. Treasurer of Callaway County, 43 Mo. 230.) But this does not appear, and the judgment of the Circuit Court will be affirmed. The other judges concur.

The State of Mo. ex rel. Ranney v. Thileneus.—State of Mo. v. Schienaman.

THE STATE OF MISSOURI *ex rel.* WILLIAM C. RANNEY, Plaintiff
in Error, v. GEORGE C. THILENEUS, Defendant in Error.

1. State *ex rel.* Circuit Attorney v. Cape Girardeau & State Line R.R., *ante*, p. 468, affirmed.

Error to Cape Girardeau Circuit Court.

L. H. Davis and L. Houck, for plaintiff in error

T. C. Fletcher, for defendant in error.

WAGNER, Judge, delivered the opinion of the court

This case presents but one point, and that is in relation to the power of the Legislature to amend by special enactment a law passed prior to the adoption of the present State constitution. This question has been examined in the case of State *ex rel.* Circuit Attorney v. Cape Girardeau & State Line R.R. Co., *ante*, p. 468; and for the reasons therein stated, the judgment must be affirmed. The other judges concur.

THE STATE OF MISSOURI, Defendant in Error, v. AUGUST
SCHENAMAN, Plaintiff in Error.

1. State v. Warnke, *ante*, p. 451, affirmed.

Error to Hannibal Court of Common Pleas.

A. J. Baker, Attorney-General, for defendant in error.

W. H. & G. F. Hatch, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

Counsel admit that the facts appearing in this record are identical, as to their legal effect, with the facts in the case of The State v. Warnke, *ante*, p. 451. Following that decision, the judgment will be affirmed. The other judges concur.

The State of Missouri v. Riedle.—The State of Missouri v. Cronyn.

THE STATE OF MISSOURI, Defendant in Error, v. GEORGE
RIEDLE, Plaintiff in Error.

1. State v. Warnke, *ante*, p. 451, affirmed.

Error to Hannibal Court of Common Pleas.

A. J. Baker, Attorney-General, for defendant in error.

W. H. & G. F. Hatch, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

Counsel admit that the facts appearing in this record are identical, as to their legal effect, with the facts in the case of The State v. Warnke, *ante*, p. 451. Following that decision, the judgment will be affirmed. The other judges concur.

THE STATE OF MISSOURI, Defendant in Error, v. PATRICK
CRONYN, Plaintiff in Error.

1. State v. Warnke, *ante*, p. 451, affirmed.

Error to Hannibal Court of Common Pleas.

A. J. Baker, Attorney-General, for defendant in error.

W. H. & G. F. Hatch, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

Counsel admit that the facts contained in this record are identical, as to their legal effect, with the facts in the case of The State v. Warnke, *ante*, p. 451. Following that decision, the judgment will be affirmed. The other judges concur.

The State of Missouri v. Hurley.—The State of Missouri v. Cartee et al.

THE STATE OF MISSOURI, Defendant in Error, v. THOMAS
HURLEY, Plaintiff in Error.

1. State v. Warnke, *ante*, p. 451, affirmed.

Error to Hannibal Court of Common Pleas.

A. J. Baker, Attorney-General, for defendant in error.

W. H. & G. F. Hatch, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court

Counsel admit that the facts appearing in this record are identical, as to their legal effect, with the facts in the case of The State v. Warnke, *ante*, p. 451. Following that decision, the judgment will be affirmed. The other judges concur.

THE STATE OF MISSOURI, Plaintiff in Error, v. JAMES CARTEE
et al., Defendants in Error.

1. *Criminal law — Misdemeanors — Disturbing public worship, indictable.*—The offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) being punishable by fine and imprisonment (*vide* same section), is an indictable one. The case is distinguishable from that of selling liquor on Sunday, which is punishable by fine only, and under Wagn. Stat. 516, § 29, amenable only to a civil action. (State v. Huffschtmidt, 47 Mo. 73.)
2. *Disturbing public worship — Circuit Court has jurisdiction.*—Of the offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) the Circuit Court has jurisdiction. (Wagn. Stat. 516, § 32; State v. Warnke, *ante*, p. 451.)

Error to St. Francois Circuit Court.

B. B. Cahoon, Circuit Attorney, with A. J. Baker, Attorney-General, for plaintiffs in error.

Clardy & Robinson, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

In November, 1870, the defendants were indicted in St. Francois county for the offense of disturbing a religious congregation.

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(Wagn. Stat. 504, § 30.) A demurrer to the indictment was sustained, and the case is brought here by appeal. The objections to the indictment are that the court in which the indictment was found, as the defendants insist, had no jurisdiction of the offense, and that the offense charged, as the defendants urge, was not indictable.

No brief in behalf of the defendants is filed, but the objections above mentioned are presumed to be founded upon the decision of this court in *The State v. Huffschtmidt*, 47 Mo. 73, where it was held that an indictment would not lie for the offense of selling liquor on Sunday in violation of the statute (Wagn. Stat. 504, § 35). The case at bar, however, is broadly distinguishable from that. Here the indictment is founded upon a different section of the statute (Wagn. Stat. 504, § 30) and is for a different offense, and upon an offense subject to a different measure of punishment. In the case now before us the offense charged is punishable by either fine or imprisonment, and is therefore not punishable by fine "only," as in the *Huffschtmidt* case. The present indictment charges an offense which is punishable by "fine not exceeding one hundred dollars, and * * * by confinement in the county jail not exceeding three months" where the offender is unable to pay the fine imposed.

In the *Huffschtmidt* case the indictment charged an offense punishable by a fine not exceeding \$50, and no imprisonment was allowable. The court there held, in accordance with the statute (Wagn. Stat. 516, § 29), that the offense being "punishable by fine only," the remedy was by civil action, as provided in the section last referred to.

The court had jurisdiction of the subject-matter of the indictment. (Wagn. Stat. 516, § 32; and see *State v. Warnke*, *ante*, p. 451.)

Judgment reversed and cause remanded. The other judges concur.

EZRA CADWALLADER *et al.*, Appellants, *v.* CATHERINE WEST
et al., Respondents.

1. *Contracts with old and infirm persons, where relation of trust exists, presumed to be void.*—Where one stands in relations of trust and confidence with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party.
2. *Deeds — Adequacy of consideration — Courts will not look into, except where inadequacy is coupled with mental imbecility.*—Courts look into the adequacy of consideration only under peculiar circumstances, as where one of the parties to a contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness, or other cause. In such cases courts of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if two facts concur, viz: inadequacy of consideration and mental imbecility, although the weakness of the mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence.
3. *Equity — Deed — Consideration — Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.
4. *Conveyances — Undue influence, what — Proof of.*—In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the donor is, from age or weakness of disposition, likely to be imposed on, the statement of a consideration where there was none, or improvidence in the transaction, are circumstances which furnish a probable, though not always a certain, test of undue influence or fraud.

Appeal from Second District Court.

Glover & Shepley, with D. T. Potter, for appellants.

I. When a deed has been made by a weak person in favor of one who stood toward him in a relation of confidence, and the provisions of the deed are unreasonable or extraordinary, or the consideration is nugatory or insufficient, or when a pecuniary consideration is set forth contrary to the truth—or more strongly still, where practicing or influence has been actually used to induce the execution—the deed will be set aside. If, in such case, an advantage is gained by the grantee, undue influence is presumed. (Hill on Trust. 23, 214, 230; *id.* 226-7; 3 Wh. &

Tud. Lead. Cas. Eq. 137-9; 4 Giff. 417; Popham v. Brooke, 5 Russ. Ch. 10; Griffith v. Robins, 3 Mad. 105; Dent v. Bennett, 7 Sim. 539; Hardy v. Hardy, 11 Wheat. 103; Whelan v. Whelan, 5 Cow. 537; Brice v. Brice, 5 Barb. 533; Dunn v. Chambers, 4 Barb. 376; 2 Dev. & Bat. 241; 13 Beav. 363; 5 Blackf. 509; 2 Gill, 83; 13 Ves. 127.) It is manifest that the deeds cannot stand as contracts for valuable consideration. The consideration is wholly inadequate. An effort is consequently made to hold them up as gifts.

II. The deeds cannot stand as donations or gifts. The same legal presumption attaches in case of a gift as in that of a sale for consideration. A gift confers a pure benefit. A gift by a weak, infirm, aged person like Mr. Cadwallader to Dr. West, who was at the time his medical attendant and business agent, and who had the donor in his own house, subject to his daily influence, is presumed by the law to have been produced by fraud and undue influence. (3 Wh. & Tud. Lead. Cas. Eq. 111, 119, 144; Sears v. Shafer, 6 N. Y. 268; Brown v. Moore, 6 Yerg. 272.) That the donor is, at the time of the gift, a member of the donee's family, and residing in his house, is proof of moral duress and undue influence. (Poston v. Gillespie, 5 Jones' Eq. 264; Archer v. Hudson, 7 Beav. 558; Taylor v. Taylor, 9 How. 199; Goddard v. Carlisle, 9 Price, 169; Maitland v. Irving, 15 Tenn. 437; Espy v. Lake, 10 Hare, 262.) There is in this case the clearest proof of active and urgent efforts by Dr. West to procure the conveyances. He had great influence over Mr. Cadwallader, and he used it all, and wholly for his own advantage.

III. The deeds cannot be considered gifts because they are not set up as gifts. The pleadings state them to be contracts for full and adequate consideration. Having failed to show these facts, the defendants cannot, in the face of the pleadings, treat them as donations—free gifts without consideration. (Hildreth v. Sands, 3 Johns. Ch. 35; 2 Sch. & Lefroy, 502; Bridgman v. Green, 2 Ves. 628; Harding v. Wheaton, 2 Mason, 387.) No one shall make out a case contrary to his pleading. The deeds are not gifts. They are made for considerations set forth on their

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face—inadequate and worthless considerations. Every line of the instrument repels the idea of a gift.

IV. The presumption of the law being that in the privacy of the confidential relations existing between the parties, and the ample opportunity which Dr. West had with Mr. Cadwallader in his house—always accessible to his influence for so long a time before the conveyance—to exert at some time or other an undue influence, the burden of proof is on the defendant to prove affirmatively that no such influence was ever exerted. (*Garvin v. Williams*, 44 Mo. 465; 3 Wh. & Tud. Lead. Cas. 144.) It is in any such case next 'to impossible to make the negative proof which the law demands. But in this case there is no negative proof at all. That Mr. Cadwallader said he made the deeds voluntarily and freely is not negative proof; for he was, at the time of making these statements, in the house of Dr. West and under his influence. The statements labor under the same legal presumption of undue influence as the deeds. The question is not whether he made the deeds willingly, but how his will was created, and lead in that direction. Did Dr. West previously impress his mind for making the deeds? That is the question. A man is about to make his will, and is told falsely that his only brother is dead; and thus unduly influenced, he gives his estate to another person. He does it freely, willingly, but the will is void for the undue and false influence which created the intention of the testator. (3 Wh. & Tud. Lead. Cas. Eq. 141, 143; *Huguenin v. Basely*, 14 Ves. 299; *Lyon v. Howe*, 6 Eq. Cas. Law, 655; *Couts v. Acworth*, 8 Eq. Cas. Law, 558; *Lee v. Dill*, 11 Abb. Pr. 219; *Goddard v. Carlisle*, 9 Price, 179; *Grovesnor v. Sherratt*, 28 Beav. 665; *Sears v. Shafer*, 6 N. Y. 268; *Tyler v. Gardner*, 35 N. Y. 595; *Brown v. Moore*, 6 Yerg. 272.) By these deeds Mr. Cadwallader, at ninety years of age, stripped himself of all his property without any provision for future support or any power of revocation. This alone is proof of fraud and undue influence. (*Forshaw v. Welsby*, 30 Beav. 249.) Frissel, who drew the deed of 1863, was the attorney of Dr. West, procured and brought to the house by him. Dr. West also procured the presence of the witnesses, and took care to have the grantor's

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mind examined to see if he was competent to make a conveyance of his property. Here is actual practicing to get hold of the property. (Consett v. Bell, 1 Young & Coll. 578; Gibson v. Russell, 2 Young & Coll. 116; Coutts v. Acworth, 8 Eq. Cas. Law, 567.) There is a legal presumption of fraud and undue influence in the relations existing between the parties and on the face of the conveyances. Besides, there is proof of actual undue influence, and not a particle of proof to the contrary. The deeds must be set aside.

Thos. C. Fletcher, Jno. L. Thomas, and Abner Green,
for respondents.

I. The mere fact of the existence of the relation of medical adviser and patient is not sufficient, of itself, to raise the presumption that undue influence was exercised, and does not put the *onus* on respondent of showing the transaction to be fair, as in case of other confidential relations. (Sto. Eq. Jur., § 313: Montesquieu v. Sandys, 18 Ves. 313; Newl. Cont. 556-8; Howell v. Baker, 4 Johns. Ch. 118; Edwards v. Meyrick, 2 Hare, 30-68; Jones v. Thomas, 2 Young & Coll. 498; Gibson v. Jayes, 6 Ves. 266; 1 Sto. Eq., § 310.)

II. It is not strictly a relation of confidence, and is not so named by Fonblanque, nor by Sugden or Chitty, and Bouvier does not so treat it. (2 Sugd. Vend. 887; Chit. Cont. 294; 4 Bouv. Inst., § 3858.)

III. In adjudged cases, where it has been held that a relation of confidence existed on the part of the person who was the physician, the courts have refused to lay down any rule as to the presumption of law arising from such relation. (Billings v. Southee, 10 Eng. L. & Eq. 37; Crispell v. Dubois, 4 Barb. 393; Dent v. Bennett, 4 M. & Craig, 296; Gibson v. Russell, 2 Young & Coll. 104; Pratt v. Barker, 1 Sim. 1; Doggett *et al.* v. Lane *et al.*, 12 Mo. 215.)

IV. There is no actual fraud shown by the evidence nor attending circumstances from which the law will raise the inference of fraud, nor to corroborate such an inference. There was no suggestion of falsehood nor concealment of the truth. (1 Sto. Eq., §§ 188, 191, 204.)

V. The evidence shows that the transaction, in reference to the deed of January 15, 1863, was a fair one on the part of Dr. West. The consideration was a good one (1 Bouv. Inst. 236, 239; Bunn v. Winthrop, 1 Johns. Ch. 329; 16 Johns. 189; Jackson v. King, 4 Cow. 216; Doe v. Hurd, 7 Black, 510; 9 Yerg. 418; 7 Johns. 26; Annandale v. Harris, 2 P. Wms. 432; Coney v. Stafford, Amb. 520; 19 Ind. 271; 9 Ind. 330; Scott v. Carruth, 9 Yerg. 418; 46 Me. 154; 30 Barb. 292; 25 Me. 326; McNeilly v. Rucker, 6 Blackf. 391.)

VI. It is very clear from the evidence that the grantor, Cadwallader, was a man of extraordinarily strong mind for one of his age, and disposed of his property in accordance with long-entertained and often-expressed intention. But the court will not inquire into and gauge the measure of his intellect if it appear that he had a competency of understanding. (Willard's Eq. Jur. 196; 4 Cow. 207; 20 Wend. 226; Dean's Med. Jur. 555.) If he was legally *compos mentis* he was a disposer of his property, and his will stands instead of a reason. (1 Fonb. Eq., book 1, ch. 2, § 3; 1 Sto. Eq., § 244; Van Alst v. Hunter, 5 Johns. Ch. 148; 1 Ves. Jr. 19; Corbit v. Smith, 7 Iowa, 60; Odell v. Buck, 21 Wend. 142; 26 Wend. 255; 1 Houst., Del., 269; Watkins v. Stockett, 6 Harr. & J. 435.)

VII. The deed was the pure, voluntary, well-understood act of a man of excellent judgment, sound reasoning powers, extraordinary memory and great firmness of purpose, as is overwhelmingly shown by the evidence; therefore it must stand, no matter what confidential relations Dr. West sustained to him, and no matter whether the consideration was adequate or not. (Huguenin v. Basely, 14 Ves. 273; Harrison v. Guest, 6 De G., McN. & G. 431; Hunter v. Adkins, 3 Mylne & Keen, 113.)

VIII. The grantor, Cadwallader, being without parents, wife or children, and entertaining a strong personal dislike to his collateral kin, with reasonable cause, and which Dr. West neither produced nor fomented, his *jus disponendi* being absolute, he obtained all he wanted for the land, and the court will uphold the exercise of his right of disposal under all the circumstances. Take away the right to so dispose of it, and the incentive to

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accumulate is destroyed, and an old man would be precluded from purchasing the care and comforts necessary to old age with the many acres acquired by the frugality and labor of earlier life. (Stevenson v. Stevenson, 23 Penn. St. 469; Hadley v. Latimer. 3 Yerg. 537.)

CURRIER, Judge, delivered the opinion of the court.

This suit was brought by the heirs at law of Isaac Cadwallader, deceased, to set aside the latter's deed to the late Dr. William West, dated January 15, 1863, as also a confirmatory conveyance of a later date. As the two instruments must stand or fall together, it will not be necessary to refer particularly to the second or confirmatory deed.

As grounds for setting aside the deed of January 15, 1863, it is alleged that West procured its execution through fraud, imposition and undue influence; that the consideration was inadequate, and that Cadwallader executed it without understanding its true character and effect, having become incapacitated, as it is alleged, for the transaction of business, through the debilitating effects of physical infirmities and extreme old age. It is also alleged that West was Cadwallader's physician and medical adviser, and that, by means of this and other confidential relations, he brought about the execution of the deed.

The answer denies Cadwallader's alleged incapacity, and denies the alleged fraud and undue influence, as also the alleged inadequacy of consideration, and avers, on the contrary, that the deed was a *bona fide* conveyance, executed by Cadwallader for and upon the consideration therein recited.

In reviewing the testimony bearing upon these issues, it will be convenient to advert to the situation of the parties and their relation to each other prior to the execution of the deed.

In the early part of the year 1850, as the evidence shows, Dr. West was residing at Hillsboro, Jefferson county, Missouri, where he was doing a fair professional business, and in possession of some pecuniary means. Cadwallader was at the same time residing on his farm near Pevely, in the same county, and some miles distant from Hillsboro. He had even then passed the ordinary

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limits of human life, being at that time between seventy-two and seventy-five years of age; seventy-two, according to the pleadings, but seventy-five, as the evidence tends to show. His means of support were ample. He had accumulated a respectable property, and was a bachelor. His domestic affairs were managed by colored servants, one of whom, a woman named Leno, was the mother of an illegitimate son of his. Cadwallader, as the evidence shows, was a careful, pains-taking, money-getting man, of decided firmness of character and excellent general intelligence, particularly upon industrial and financial subjects.

In view of his advanced age and general situation, he concluded in the spring of 1850 to readjust his domestic arrangements, and did so by introducing into his household new parties, and providing for his own support and nursing during his declining years. He had been acquainted with the wife of Dr. West from her girlhood, and for that reason, or from some other cause, made overtures to Dr. West to go and live with him and take a portion of the home farm. The negotiations resulted in the following arrangement: Cadwallader conveyed to West 200 acres of the home place, reserving to himself during his life the use of the land conveyed, jointly with West, and further providing that the premises should revert to him in case he survived West. In consideration of such conveyance, West undertook to provide for and comfortably take care of Cadwallader during the latter's natural life. The provision for support was inserted in the deed as the consideration for the conveyance.

In pursuance of this arrangement, Dr. and Mrs. West went to reside with Cadwallader, and from that time continued to live with and take care of him until he died, in 1864, in all things faithfully carrying out the stipulations recited in the conveyance. This deed bears date May 4, 1850. It appears that Dr. West discharged the duties assumed by him with assiduous care and fidelity, and especially that he prescribed for and nursed Cadwallader in his sickness with kindness and prompt attention.

From 1850 to 1863, Cadwallader increased in infirmities as well as years, and appears to have been much of the time under the influence of medicine. He gradually became forgetful and

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childish, and required much watching and care. Through failing memory and growing weakness he was prone to neglect his prescriptions, and Dr. West, as the evidence shows, repeatedly spoke of him as requiring the watchfulness and care demanded in the nursing and oversight of children. He was subject to various physical infirmities, and became so deaf that it was difficult to communicate with him. Judge Rankin, one of the defendant's witnesses, testified that Cadwallader was so deaf that, at the time the deed of January 15, 1863, was executed, he thought it would be an "awful job" to read it to him. The evidence clearly and abundantly establishes the fact that Cadwallader was no exception to the rule that "the days of our years are three-score years and ten; and if by reason of strength they be four-score years, yet is their strength labor and sorrow."

With the decay of his physical powers the energies of his mind abated. His memory was so seriously impaired and broken down that he appeared to have forgotten that he had made any arrangements for his own support, and would seem to have executed the deed of January 15, 1863, upon the mistaken idea that he was thereby making provision for himself as well as for the negro woman. His statements were given in evidence to the effect that he looked upon Dr. West as a disinterested benefactor, and as having saved him from "starvation." It was in evidence that Cadwallader, years after the arrangement of May 4, 1850, by which he secured his own maintenance, talked about making over his remaining property to secure for himself care and support for the rest of his life. He seems to have been infatuated with the notion that he was exposed to want and suffering. According to the evidence, Cadwallader, at the time the deed in question was executed, was but the physical and mental wreck of what he had been in his mature manhood, or what he was at the time the deed of May 4, 1850, was executed, although he had even then passed his seventy-third year. In 1863 he was between eighty-five and ninety years of age. He had ceased to do business, and rarely left the house. His affairs gradually fell into the hands of Dr. West, who supervised them as his agent.

Under these circumstances it cannot be doubted that Dr. West

acquired an important if not a controlling influence over Cadwallader's mind and acts. They had lived together in the same house for thirteen years, and were constantly associated together around the same table and fireside. As occasion required, Dr. West acted as the agent, friend and medical adviser of Cadwallader, and there was some evidence tending to show that he acted to some extent as his spiritual adviser as well. Cadwallader's religious views were modified, and he became increasingly hopeful as to the realities of the future and careless of the present life.

Dr. West won Cadwallader's confidence completely, and it is no reproach to him that he did so. Nor is it any reproach to him that he was kind and ingratiating in the discharge of the duties of his trust. Nevertheless, when Dr. West came to make bargains with his *quasi* ward, a feeble old man in his dotage, he placed himself in a position of great delicacy, and one that required of him the exercise of the highest sentiments of justice and honor. Indeed, the law is so jealous of contracts made between parties situated in relation to each other as Dr. West was in relation to Cadwallader, that it presumes them to have been the result of undue influence emanating from the stronger party.

With this general view of the condition and situation of the parties and their relations to each other, I now turn to a consideration of the specific contracts entered into between them during the thirteen years above mentioned. The arrangement of May 4, 1850, has already been referred to. It was made at a time when neither party was particularly subject to the influence of the other, and before Cadwallader's mind and memory had become seriously impaired. Cadwallader thereby made a careful and judicious provision for his own comfort, happiness and future support. The contract was quite as favorable to him as it was to West. Their later contracts are of a different character. There were three of them, and each successive arrangement bore with increasing severity upon the weaker party.

The first of the three was made in April, 1856, six years after West had assumed Cadwallader's support. It was as follows: Cadwallader conveyed to West his life estate and reversionary

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interest in the two hundred acres described in the deed of May 4, 1850; also all his joint interest in the products of the farm, including the stock, together with the following personal effects, to-wit: "A wagon and all the horses, cattle, plows, harness and farming utensils then on the farm, belonging to said Cadwallader." The consideration for this conveyance was West's agreement "to take care of and support at his residence on said farm, an aged free black woman named Leno, formerly the property of said Cadwallader, for and during Cadwallader's natural life," but the support was not to include clothing. The amount of property thus turned over for Leno's support while Cadwallader should live—and he was then about eighty—was considerable, although the evidence fails to disclose its value with distinctness. West, however, seems to have got the better of the bargain. Leno was then an "old woman," as the deed recites, but how old, or what were her prospects of life, the evidence fails to inform us. It can hardly be supposed, however, that Cadwallader acted with intelligence in contracting for her support merely while he lived, leaving her at the moment of his death destitute and wholly unprovided for.

The next business operation between these parties occurred in October, 1858, and consisted of an exchange of lands as follows: Cadwallader conveyed to West three and a half acres of valuable land near the Pevely railroad station, and West conveyed to Cadwallader as an even exchange an equal amount of land in another locality—a long, narrow strip sixty-two feet wide and more than half a mile long, a portion of it being rocky and worthless. As a business operation this transaction, so far as the facts and circumstances are disclosed in the evidence, is wholly indefensible. Of course Cadwallader was at liberty to give away his valuable lands if that was his pleasure.

We now come to the deed of January 15, 1863, which constitutes the subject of the present litigation. By it Cadwallader stripped himself of property completely, and turned everything over to Dr. West, down to and including the furniture of his chamber, and for a most palpably inadequate pecuniary consideration. The deed conveys to West all of Cadwallader's lands,

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bonds, notes, and all evidences of debt, and every description of his personal property, "in consideration that the said party of the second part [West] had executed to the party of the first part [Cadwallader] his obligation to provide suitable food, clothing, house-room and necessary medical attendance for the negro woman named Leno, so long as she should live; and for the further consideration of \$100, and (also) in consideration of the kindness and assiduous care and attention given me [Cadwallader] by the said party of the second part in my late sickness." The substance of this elaborately stated consideration is this: \$100 in money and the support of the old colored woman Leno for the remnant of life which might remain to her after Cadwallader's death; for West had assumed her support under the previous contract up to that time, except her clothing. What Leno's prospects of life were in 1863 the evidence fails to show, except as it appears that she was already "old" in 1856, seven years before. So far as the evidence throws any light upon the subject, the charge of her support was not likely to be either heavy or long continued.

There has been no attempt to attach any specific pecuniary value to Dr. West's previous "care and kindness" to Cadwallader in the latter's then late sickness; nor is it claimed that Cadwallader became pecuniarily indebted to West for such care and kindness. West was bound to take care of Cadwallader in sickness as well as in health, under the contract of May 4, 1850. In nursing Cadwallader in his sickness, West rendered a service for which he had then already been paid. The result of the matter is that the support of Leno and the \$100 is all that Cadwallader got for his entire estate, real and personal.

The value of such real and personal estate the evidence fails to show with a satisfactory distinctness. Judge Rankin, who was familiar with Cadwallader's affairs, testified that he had a "great deal" of money loaned out, and counsel have admitted in the argument that the personal estate was of the value of \$3,000. In those times that amount would hardly be regarded, in the language of Judge Rankin, as a *great deal*. But that sum, coupled with Rankin's valuation of the land, 372 acres, shows an estate of some \$15,000. There is nothing in the evidence to indicate

that the annual cost of Leno's support would absorb more than a fractional part of the probable annual income from the property, and that at most only for a few years. The pecuniary considerations mentioned in the deed were no equivalent for the estate conveyed by it. The inadequacy of the consideration is apparent and gross.

But the deed is not necessarily to be set aside because it was executed upon an inadequate consideration. Courts do not ordinarily look into the question of the adequacy or inadequacy of a valuable consideration. That is done only under peculiar circumstances, as where one of the parties to the contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness or other cause. In such cases courts of equity investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition. If two facts concur, viz: inadequacy of consideration coupled with mental imbecility, although the weakness of mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party.

The rule on this subject is thus declared: "Where there is *weakness of mind* arising from old age, sickness, intemperance or other cause, and a plain inadequacy of consideration," equity will interfere and relieve the party from the injustice of the unequal contract. That proposition was stated in *Tracy v. Sacket*, 1 Ohio St. 60, as expressing the result of all the authorities bearing upon the point. (3 Wh. & Tud. Lead. Cas. Eq. 138; *Hill on Trust*. 214; and see *Buffelow v. Buffelow*, 2 Dev. & Bat. 241.) It is not necessary in such cases to show that the party was actually misled by fraud or undue influence. (See authorities above.) But the presence of undue influence of course strengthens the case. Thus, it is asserted as a "general principle that the inadequacy of consideration, or the presence of hard and disadvantageous stipulations, or the mere fact that a right has been conceded without an equivalent, will be a sufficient warrant for the interference of equity, where the weakness of the complainant or the position of the defendant makes it the duty of the one to take that care of the other which the latter is unable

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to take to himself, *although there may be no proof of actual fraud, or the exertion of undue influence.*" (3 Wh. & Tud. Lead. Cas. Eq. 139.)

These principles, applied to the facts of the case at bar, are fatal to the defense, so far as the defense rests upon the sufficiency of the deed as a valid and binding *contract*; whether the deed can be sustained as a gift, is another matter. The grantor was in an enfeebled and weak state of mind; his memory of recent or current events nearly gone; the consideration of the deed was inadequate, and the grantee stood in a confidential relation to the grantor—in fact, in a complication of confidential relations, as we have seen; but the grantor's weakness of mind, coupled with the inadequacy of the consideration, were, as has already been stated, sufficient of themselves to avoid the deed.

Before dismissing this branch of the case, it may be well to refer again to the opinions of Dr. West, bearing upon the question of Cadwallader's mental state. As we have seen, Dr. West described him as extremely childish, and as requiring the care bestowed upon children—that is, as being in his dotage. He not only expressed these opinions, but acted upon them. Preliminary to the execution of the deed of January 15, 1863, and as though anticipating a future contest, he had Cadwallader specially examined with reference to his capacity to execute a valid and binding contract. The fact that such an examination was had at Dr. West's instance shows at least this: that West considered there was occasion for it; that he deemed it prudent to arrange in advance for evidence to fortify the deed. The character of the examination was also significant. It was conducted by an unprofessional neighbor who does not appear to have had any particular interest in Cadwallader or his heirs, and merely elicited from Cadwallader an expression of his religious hopes and feelings. Nothing appears to have been said in relation to property or business transactions, or any merely secular interest. The examination at best was superficial, and wholly unsatisfactory as showing capacity in Cadwallader to transact important business intelligently without the aid of friendly counsel. The fact of the examination and the character of that examination tend in the opposite direction.

As a contract based on an adequate consideration, the deed must fall. Can it be sustained as a gift? Owing to the relation which the parties sustained toward each other, the deed was presumptively the result of undue influence, and therefore *prima facie* void for that reason. It has been repeatedly declared by learned chancellors that the mere relation of patient and medical adviser was sufficient to avoid the contracts of the former made with the latter during the continuance of such relation. In *Dent v. Bennett*, 4 Mylne & Cr. 277, Lord Cottenham said that this was "undoubtedly so;" but said his lordship, "I will not narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the descriptions of persons against whom it ought to be most freely used." (See 1 Sto. Eq., § 314.) This rule "stands upon the general principles applicable to all the variety of relations in which dominion may be exercised by one person over another." It is upon this general principle that courts base their action in cases like the present, arising between parent and child, guardian and ward, principal and agent, attorney and client, patient and physician; and the principle applies with as much force to the relation of patient and medical adviser as it does to the other relations specified. In *Buffelow v. Buffelow*, 2 Dev. & Bat. Eq. 250, Ruffin, C. J., declares that the rule on which the court interferes between attorney and client would be a "lifeless skeleton" unless it were animated by a principle which would enable it to embrace all cases of the abuse of the like confidence. That was a case where the defendant, *who was not an attorney*, appeared before a magistrate in the interest of the other party as his friend. The court, however, applied to the case the rule which obtains between a professional attorney and his client, on the ground that the rule was based on a principle broad enough to include the particular case. That general principle has already been given, and it is comprehensive enough to embrace the case at bar. But Dr. West was not merely Cadwallader's physician, he was his agent, companion and friend as well. The two had lived together in the same house for thirteen years on terms of general intimacy and confidence. West had every opportunity of

influence and control which one man could well have over another. Added to these opportunities was the fact that Cadwallader was a feeble old man, rapidly sinking to the grave under the weight of more than four-score years, near four-score and ten. There can be no doubt that the general principle adverted to applies to the relations subsisting between Cadwallader and West.

The presumption that West exerted an undue influence over Cadwallader's mind in procuring the deed, springs out of the relations which they sustained toward each other, and is intensified by the circumstances of Cadwallader's mental and physical condition. Is that presumption repelled by the evidence? In this class of cases the "court watches the whole transaction with great jealousy, not only for the purpose of ascertaining that the person likely to be influenced fully understood the act he was performing, but also for the purpose of ascertaining that *his consent to perform the act was not obtained by reason of the influence possessed by the person receiving the benefit*; not that the influence itself flowing from such relations is either blamed or discountenanced by the court. On the contrary, the due exercise of it is considered useful and advantageous to society. But this court holds as an indispensable condition that this influence should be exerted for the benefit of the person subject to it, and *not for the advantage of the person possessing it.*" (Houghton v. Houghton, 15 Beav. 299.) The deed, then, is not only presumptively invalid, but the whole transaction out of which it issued is to be "watched with great jealousy" in the interest of the weaker party, and so in the interest of his heirs and legal representatives. Under the guidance of this rule we are to consider the evidence.

It may be remarked in this connection that the answer does not claim that the deed was executed as a gratuity. The defense is placed upon no such ground by the pleadings. The theory of a gratuity is an afterthought. It is not the theory of the answer, nor was it the theory upon which the deed was drawn. Upon the face of the deed it purports to have been executed for and upon a valuable consideration, and the answer asserts the fact to have been so. Now it has repeatedly been held that equity will not

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permit a party to take a conveyance for consideration, and thereafter set up the same conveyance as a gift. Conveyances have repeatedly been set aside on that ground. (Bridgman v. Green, 2 Ves. Sr. 627; Dent v. Bennett, 4 Mylne & Cr. 273.)

Waiving, however, the conclusiveness of the point thus stated, the fact that the deed was executed as an instrument of bargain and sale, based upon consideration, and not as a deed of gift, is nevertheless not to be lost sight of in what remains to be said. Did Cadwallader intelligently execute the conveyance as a deed of gift? And if so, was it the unbiased, spontaneous act of his own mind, acting voluntarily and without solicitation on the part of West? The proof is convincing that the scheme of the deed was matured between West and Cadwallader without the intervention of third parties. There is no pretense that any one else knew of it until the day of its execution, except Frissell, the attorney who drew it up; and there is no claim that Frissell knew anything of the matter until he was called upon by West to give the subject his professional attention. He was employed by West in the name of Cadwallader, but West alone manifested any deep concern in connection with the business to be transacted. West was active and vigilant throughout. He was not only solicitous for Frissell's services, but to have them at once and without delay. The evidence leaves no doubt on this point. His anxiety proves his interest, and his hurry shows that he feared the possible result of delay. His anxiety and hurry are not explained except upon the theory that an arrangement existed between him and Cadwallader, which was of interest and importance to the former, and which West wished reduced to writing and made secure at the earliest practicable moment. In fact, West told the defendant's witness, Mocbee, as the latter testifies, "that the old man was going to make a conveyance of his property to him and *fix up that business.*" This was before Frissell was brought in, and shows that the "business" had then already been arranged. West was at the time in pursuit of Frissell to go to Pevely and draw up the deed of January, 1863. Frissell was the only third party shown to have had any conference with Cadwallader in relation to the deed prior to its execution. For whom did he act?

What passed between him and Cadwallader the evidence fails to show. We have the results, however, in the form of a deed which stripped Cadwallader bare of property and placed everything in the hands of West. The deed shows upon the face of it that it was drawn in the interest of the grantee, and not in the interest of the grantor. Every circumstance about it points in that direction. Its labored effort to express an adequate consideration, and especially the entire absence of any provision or clause in it favorable to the grantor, indicates this. It was absolute and unconditional, and reserved to the grantor no power of revocation or modification. It took from him his entire estate, and left him a dependent upon West from that time forward, without the slightest guaranty of support, even as a consideration for the conveyance.

But Cadwallader evidently supposed he was making provision for himself as well as for the colored woman Leno. His statements before and after the execution of the deed show that. Yet the deed contained no provision on that subject. The deed upon the face of it furnishes striking evidence of incapacity or improvidence on the part of Cadwallader, and it is quite impossible to suppose that Frissell regarded himself as acting as the grantor's attorney and counselor in drawing it up. The deed contains no trace of good advice given in the interest of Cadwallader.

Cadwallader, then, executed the deed without the assistance and counsel of friendly third parties. Feeble and broken as he was, he acted alone, and that is a circumstance greatly to the prejudice of the transaction. The non-intervention of a disinterested third party or independent professional adviser, "especially when the donor is, from age or weakness of disposition, likely to be imposed upon; the statement of a consideration where there was none, or the improvidence of the transaction, furnish a probable, though not always a certain, test of undue influence or fraud." (3 Wh. & Tud. Lead. Cas. Eq., in 70 Law Lib. 60; *Harvey v. Morant*, 8 Beav. 439.) All these circumstances conspire to condemn the deed under consideration, and there was no important circumstance to abate or qualify their force. It is true, indeed, that the deed was not entirely without consideration; but

the consideration, as compared with the value of the property transferred, was slight and insufficient.

Throughout the transaction West was the urgent and active party. He procured the attorney, the magistrate and the witnesses; and, in order to leave nothing undone that vigilance could suggest, he went to the extent of having, as we have seen, Cadwallader's mental soundness inquired into. All these matters are clearly established by the evidence. What occurred between the parties privately, the evidence fails to inform us. As to that we are left to inference and conjecture. West had every facility for the exertion of an undue influence over the mind of Cadwallader, and all the surrounding circumstances of action and activity on his part go to raise the inference that he did not neglect his opportunities.

But it is urged that Cadwallader was either hostile or indifferent to his relations, and that the evidence shows he had, many years before, quarreled with some of them, and that he took but little interest in others. It appeared also that he had avowed his determination to do nothing more for his kindred. This furnishes no explanation of Cadwallader's improvidence as to himself, nor does it justify or excuse the exertion of undue influence on the part of West. If Cadwallader had been left to himself and his own natural biases of mind, he might have become reconciled to his relations, as he became reconciled to West after a most violent quarrel with him. In 1856 these parties fell out, and so violent was the feud that Cadwallader challenged West to mortal combat, and West was upon the point of abandoning Cadwallader and his premises. These parties, however, changed their minds, and subsequently re-established relations of friendliness and confidence. So it might have been between Cadwallader and his relations, had no unfavorable influence intervened. However this may be, it was West's duty, in view of his confidential relations to Cadwallader, to leave him uninfluenced in the disposition of his estate; at least to forbear the exertion of influence to secure the estate to himself.

It is again insisted that Cadwallader made the deed to West from motives of gratitude to Dr. and Mrs. West, springing out

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of their previous care of him in sickness. The evidence does not sustain that view. The deed was clearly intended to secure a support for Leno. That is not denied, and the possible cost of that support has been magnified in order to show adequacy of consideration, independently of the question of grateful recollections. It is, moreover, equally clear from the whole current of Cadwallader's statements, both before and after the execution of the deed, that he intended to secure to himself additional guaranties for his own support. He must have acted under a misapprehension as to the effect of the deed, for it secured to him nothing. It left him, as to his support, in the same condition he was prior to its execution, except as the deed took from him all pecuniary means of providing for himself.

It is further insisted, as rebutting the presumption of undue influence, that Cadwallader not only avowed his gratitude to West, his aversion to his kindred and his determination to disinherit them, but that he declared his contentment with the deed after it was executed, and in fact executed a subsequent deed to ratify and confirm the first—that is, to ratify and confirm the deed of January, 1863; and these facts are shown by the evidence.

Cadwallader died in 1864, and it must be borne in mind that he was constantly growing feebler and weaker, mentally and physically, from the day the deed of January, 1863, was executed down to the day of his death. If he failed to comprehend the effect of the first deed, as he clearly did as regarded his own support at least, did he understand the second any better? If the first deed was the result of undue influence, when did that influence cease to operate? From the day the deed of 1863 was executed, for the remaining months of his life, Cadwallader was completely in the hands and subject to the influence of West. If the first deed was the result of West's active interposition and influence, but little importance can be attached to the subsequent deed or Cadwallader's subsequent declarations. If the first deed is too weak to stand alone, it cannot be supported by subsequent acts and declarations which challenge still less of confidence. (See Wh. & Tud. Lead. Cas. 102, § 3; 3 Am. Eq. Cas.)

Cadwallader consented to these transactions, but did he understand them? Was his consent the result of the influence possessed by the person receiving the benefit? The law presumes that it was, and that presumption is not removed by the evidence. The facts and circumstances which go to explain and uphold the deed of 1863, are met and balanced by other facts and circumstances of an opposite tendency. The confidential relations of the parties raising the inference of undue influence is not the only circumstance to be weighed in opposition to the deed. It shows improvidence on its face. It was executed without the intervention of disinterested third parties and without the aid of independent professional counsel. The grantor was in his second childhood, and the grantee, who was to enjoy the benefits of the deed, was persistent and active in procuring its execution, at least as regards all the external surroundings of the transaction. Were his efforts limited to these outward acts? Cadwallader was a dependent inmate of the grantee's family. What occurred, what influences were brought to bear within that circle, the evidence does not disclose. The law presumes the presence of undue influence where parties are situated in relation to each other as were the parties to the deed under consideration. In the case at bar, as already remarked, that presumption is not overcome by countervailing facts and circumstances.

The judgment of the court below must therefore be reversed and the cause remanded. The Circuit Court will proceed to take an account and to enter up its final decree in accordance with the views expressed in this opinion. The other judges concur.

Miller v. Talley.

SARAH MILLER, Plaintiff in Error, v. JESSE R. TALLEY,
Defendant in Error

1. *Dower — Ejectment — Merger, doctrine of, when applicable.*—Before the assignment of a widow's dower, ejectment will lie on her behalf for the dwelling-house, messuage, etc., of which her husband died seized. (Wagn. Stat. 542, § 21.) And her right will not be defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that the widow is heir to the reversion. Her dower estate in such case will not merge in the reversion, for the doctrine of merger applies only where the less and greater estates come together without any intervening estate.

Error to Cape Girardeau Circuit Court.

Houck and Sanford, for plaintiff in error.

I. "Until dower is assigned, the widow may remain in and enjoy the mansion-house of her husband, and the messuage or plantations thereto belonging," and, when deforced, may maintain ejectment for the same. The remedy given under section 22 of the dower law (Gen. Stat. 1865) is only cumulative. (See Wagn. Stat. 542, § 21; *id.* 557, note 1; *Stokes v. McAllister*, 2 Mo. 166; *Orrick v. Pratt's Adm'r*, 34 Mo. 227; *Waller v. Mardus*, 29 Mo. 28)

II. Since the enactment of the statute of descents in 1822, the laws of this State have not recognized or created any such an estate in lands as a tenancy by the curtesy. No such an estate exists in this State.

III. Admitting, for the purposes of the argument, that there is such an estate in the lands as a tenancy by the curtesy, still the doctrine of merger, as claimed by the defendant, cannot apply in this cause and unite the two estates of the widow — the dower and the fee — while there is still an outstanding estate. If this doctrine could apply, its only effect would be to destroy the outstanding estate of curtesy.

Davis and Green, for defendant in error.

I. The right of dower before its assignment is not such an estate as will maintain ejectment. (*Beal v. Harmon*, 38 Mo.

435; *Benoist v. Murrin*, 47 Mo. 537.) In the case above cited this court held that to enable parties to maintain ejectment they must show a legal interest and a possessory title.

II. When the fee of the estate vested in the plaintiff by the death of the daughter (see 4 Kent, 102 *et seq.*) there was a merger of the right of dower, and the privilege of quarantine in law if not in equity.

BLISS, Judge, delivered the opinion of the court.

The plaintiff is the widow of Jesse A. Miller, and her dower not having been assigned, she brings this suit to recover possession of the dwelling-house, messuage and plantation, of which he died seized, claiming it under her right of quarantine. It appears that she is the sole heir of her daughter, who gave birth to a living child, which shortly died; and the daughter's husband, the defendant Talley, claims the right of possession as tenant by curtesy.

The statute is unequivocal as to the widow's right to possess the dwelling-house, etc., until dower is assigned (Gen. Stat. 1865, ch. 130, § 21; Wagn. Stat. 542), and unless she could bring this action, she might be kept out of possession. Hence it is held that ejectment will lie in her favor. (*Stokes v. McAllister*, 2 Mo. 163.) But defendant claims that inasmuch as the plaintiff inherits the fee as heir of her daughter, her right of dower and quarantine is merged in the greater estate, and thus the curtesy is let in to defeat her possession altogether.

The right to remain in and enjoy the dwelling-house, etc., can hardly be called an estate, though it is somewhat analogous to one at will; still it is a clear statutory right, and can only be terminated by an assignment of dower. If the dower is merged in the inheritance it cannot be assigned, and thus the possession by the widow will continue during life, which would be fatal to defendant's claim. But dower, under the circumstances, will not merge.

Merger takes place when a less and greater estate come together in the same person in the same right, as when the holder of the term purchases or inherits the fee, and the term is extinguished; upon the principle that one cannot be tenant to himself. It can

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only take place, however, when the estates come together without any intervening estate; otherwise the lesser estate would be lost altogether, and the reversion only be held, as is claimed in the case at bar, or the intermediate estate be destroyed. In either case rights of property would be sacrificed; and the law will not permit merger to so operate, but will preserve the estates apart until they can come together with no other estate intervening.

It does not appear that the plaintiff is actually dispossessed of all the property she is entitled to hold; but defendant acknowledges that he is in possession of eighty-seven acres of the plantation, for which judgment should have been rendered. The judgment of the Circuit Court is therefore reversed, and judgment is entered for the amount so in possession of defendant. The other judges concur.

LAWRENCE BOEHLERT *et al.*, Plaintiffs in Error, v. JOHN C. MCBRIDE, Defendant in Error.

1. *Trusts and trustees — Trustee's sale — Fraud, proof touching — What insufficient.*—The fact that property was sold by a trustee for a sum less than half its value, and was shortly afterward sold back to him by the purchaser for the same amount, is not sufficient of itself to fix on the trustee the charge of having speculated at the sale in violation of his duty. To that end there should be some proof of an understanding between him and the bidder at or prior to the sale.

Error to Perry Circuit Court.

B. Cassell, for plaintiffs in error.

The sale by the sheriff was a mere snam to evade the law prohibiting him from purchasing at his own sale. A purchase of the trust estate *per interposition personam* by a trustee, at an inadequate price, carries fraud on its face. (Smith v. Williams, 12 Mo. 106-9.)

He cannot, without an enabling act, purchase at a sale made by himself. (2 Am. Law Reg. 729, §§ 35, 38, and note; Goode

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v. Comfort, 39 Mo. 325, 607; Hull v. Voorhis *et al.*, 45 Mo. 555; Hill on Trust. 223; Jamison v. Glasscock, 29 Mo. 191-8.)

He cannot speculate for his private gain with the subject-matter committed to his care, to the prejudice of his principal. (Grumley v. Webb, 44 Mo. 451; State v. McKay, 43 Mo. 603; Thornton v. Irwin, 43 Mo. 165; Boardman v. Florez, 37 Mo. 561; R. C. 1855, p. 747, § 52; Rea *et al.* v. Copelin, 47 Mo. 83.)

J. C. Killian, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity, brought to set aside a sale under a deed of trust. The sale sought to be set aside was made on the 2d day of February, 1863. It appears that the trustee died prior to the sale, and that the sale was made by the defendant as sheriff of Perry county. The petition charges that the sale was fraudulent; that the defendant purchased the property at his own sale, in the name of a third party, at a depreciated price; that he discouraged bidding; and that the sale was made by the sheriff, when it ought to have been made by the legal representatives of the deceased trustee. It is averred in the petition that the provision in the deed of trust was that upon default of payment the sale should be made by the "trustee or his legal representatives, or, in case of death or absence from the State, by the sheriff." The answer alleges that the provision on this subject was that the sale should be made by the sheriff in case of the death or absence of the trustee, making no mention of his legal representatives. So far as these two statements are in conflict, the latter must be regarded as a contradiction of the former, leaving the point of difference to be determined by the evidence.

At the trial the plaintiffs read in evidence the sheriff's deed executed in pursuance of the sale, and that recited the provision in the deed of trust in regard to a sale by the sheriff in accordance with the allegations of the defendant's answer; and that was all the evidence there was in regard to the matter. The deed of trust itself was not put in evidence by either party, so that we

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are left in the dark as to its exact provisions, and must accept the recitals of the sheriff's deed as stating the clause in question truly.

The evidence of fraud in the sale, or of improper conduct on the part of the defendant, is slight and unsatisfactory. One witness testified that he forbore bidding because he regarded himself as disqualified from bidding, and that he acted upon the idea that his bid would not be received; but there was no evidence that this opinion was induced by the statements or acts of the defendant. The property sold for \$186, which the plaintiffs claim was less than half its real value. There is nothing particularly remarkable in that when we consider that the sale was made in 1863, in the midst of the war.

A few days after the sale the purchaser conveyed the property back to the defendant. His deed was read in evidence, and the deed shows a consideration of \$186, the same price at which the property was bid in at the public sale. These are significant circumstances, but they are not sufficient of themselves, standing alone as they do, to fix on the defendant the charge of having speculated at the sale in violation of his duty as a trustee. In order to fix that charge upon him there should have been something more—something pointing to an understanding between him and the bidder at or prior to the sale. There was nothing wrong in a purchase subsequent to the sale, unless the subsequent act was the result of what had previously taken place.

The recitals in the sheriff's deed show a sale in conformity with the provisions of the deed of trust, so far as we are made acquainted with those provisions, and there was no evidence in contradiction of them. They must therefore stand. After a careful examination of all the evidence in the case, putting out of view that offered by the defendant, and received against the plaintiffs' objections, I am constrained to adopt the conclusion that the judgment of the court below was warranted, and that it ought to be affirmed. The other judges concur.

Langford v. Caldwell.

JOHN LANGFORD, Appellant, v. JOSEPH T. CALDWELL,
Respondent.

1. *Contract to convey land—Suit to recover purchase money—Parol contract cannot be substituted for written one.*—In consideration of a certain payment, one made his written agreement to convey a tract of land on receipt of a deed therefor from the State. Failing to receive it, the least he could do was to pay back the purchase money.

The contract indicated an expectation of receiving such a deed in a reasonable time; and in suit to recover back the money it would not be admissible for defendant to show that the purchaser never expected a deed, but only desired possession of the land to enable him to carry away a quantity of timber. This would be, in effect, substituting another and a different contract by parol in the place of the written one.

Appeal from Clark Circuit Court.

Polk, Causey & Drake, and H. S. Lipscomb, with Givens, for appellant, cited 1 Greenl. Ev., ch. 15, §§ 275-7; Weston v. James, 1 Taunt. 115; Greenl. Ev., § 281; Leslie v. De la Torre, cited 12 East, 583; Barrett v. U. M. Fire Ins. Co., 7 Cush. 175, 180; Lee v. Howard & Co., 3 Gray, 583; Singleton v. Fore, 7 Mo. 575; Woodward v. McGaugh, 8 Mo. 161; Murdock v. Ganahl, 47 Mo. 135.)

Redd, for respondent.

I. There can be no breach of defendant's contract until the State has first made a deed to him.

II. Defendant concedes that parol evidence is not admissible to vary or contradict the written contract; but defendant submits that it is admissible to show the existence of another and a further consideration not inconsistent with the one mentioned in the writing, as in this case. (1 Greenl. Ev., §§ 285, 287.)

BLISS, Judge, delivered the opinion of the court.

The defendant entered into a written agreement, for the consideration of \$260 in hand paid by one Schnebly, to sell him certain real estate, the agreement concluding thus: "for which I bind myself and assigns and administrators to make a good and sufficient deed as soon as I receive my deed from the State of

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Missouri." Schnebly assigns the contract to the plaintiff, and the defendant being unable to obtain title from the State, this suit is brought to recover back the consideration.

At the trial the defendant was permitted to offer evidence to show that the purchaser never expected a deed for the land, but only desired the possession to enable him to take the timber for his saw-mill. Upon this evidence the defendant receiving judgment, the plaintiff appeals.

This is an unusual way of selling timber, and especially upon land not belonging to the seller. Though such possibly might have been the intent, yet the contract was to sell the land, and it would outrage every principle of law to permit another and different contract to be submitted by parol.

The contract obligated the seller to convey when he received his deed from the State of Missouri; which indicated an expectation of receiving such deed within a reasonable time. Not receiving it, the least he can do is to pay back the purchase money, for which, with interest, judgment will be rendered. The other judges concur.

DAVID WORTMAN, Respondent, *v.* JAMES W. CAMPBELL,
Appellant.

1. *Practice, civil — Evidence — Verdict — Appeal.*— In law cases the Supreme Court will not reverse because the verdict is against the weight of the evidence.

Appeal from Adair Circuit Court.

Harrington & Cover, for appellant.

De France & Hooper, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding commenced before a justice of the peace, under the forcible entry and detainer act, to recover possession of the premises described in the complaint. The complaint contains two counts: one based on an alleged wrongful

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detention of the premises, the other upon an alleged forcible entry and detainer. On appeal to the Circuit Court the plaintiff was required, on motion of the defendant, to elect on which count he would go to trial, and the plaintiff elected to try the case upon the first count, and it was accordingly tried upon that count alone. Under the evidence the facts were found against the defendant, and that seems to be the main difficulty with his case.

The complaint is objected to as containing incongruous counts, but the trial was confined to one count, and the defendant wholly neglected to take the opinion of the court as to the character or sufficiency of the complaint, either by demurrer, motion in arrest, or motion to strike out. There is nothing here for review in this court. No instructions were either asked or given, and no exception was taken to any ruling of the court upon the evidence. In a word, the defendant failed to save any point of law in the proceedings or rulings of the Circuit Court for this court to re-examine and adjudicate.

The judgment will be affirmed. The other judges concur.

ABNER BIGELOW, Respondent, v. THE NORTH MISSOURI RAILROAD COMPANY, Appellant.

1. *Railroad companies — Damages, action for against — Negligence, when implied.*—In an action based upon the statute making railroad companies liable for all injury done to stock when their roads were not properly inclosed with lawful fences (Wagn. Stat. 520, § 5), there is no necessity for alleging or proving negligence. The law in such cases implies negligence.
2. *Practice, civil — General verdict on different counts improper — Objection to, taken when.*—It is error to render a general verdict where the petition includes several distinct causes of action; but if a party wishes to avail himself of the error, he must, by an appropriate motion, bring the matter before the court trying the cause.

Appeal from Montgomery Circuit Court.

Orrick & Emmons, with Dwyer & Musick, for appellant.

I. The general verdict on both counts was error. (Mooney v. Kennett, 19 Mo. 551; Clark's Adm'r v. Hann. & St. Jo. R.R. Co., 36 Mo. 215.)

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II. This error was properly passed upon in overruling the motion for a new trial. A motion in arrest refers only to the pleadings, which, as understood in law, are the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense, until the issues for trial are framed. (Warner v. Morin, 13 Mo. 455.)

Rosenburger, and *Diggs & Buckner*, for respondent.

I. In the case at bar, the law implies negligence from the killing. (Wagn. Stat. 520, § 5, and authorities referred to.)

II. The error of the jury in giving a general verdict on both counts will not avail defendant, no motion in arrest having been made. The reasons for a new trial refer exclusively to the action of the court on the trial, in excluding testimony and giving and refusing instructions. (Long v. Towle, 41 Mo. 398; Banks v. Lades, 39 Mo. 406.)

WAGNER, Judge, delivered the opinion of the court.

The action was against the defendant for killing the plaintiff's stock, at a place where the road-bed was not sufficiently inclosed by a lawful fence, and where there was no crossing of a public highway. The petition contained two counts. The first charged the defendant with killing three hogs of the value of forty-five dollars, for which sum judgment was asked. The second count alleged the killing of five mules, one horse and one colt, of the value of one thousand and forty-five dollars, for which judgment was also prayed. The answer was a denial of all the averments set forth in the petition. Trial before a jury, and verdict for plaintiff for one thousand and sixty dollars and sixty cents. Upon the trial the defendant introduced no evidence, and it is not seriously contended that the court committed any error in the matter of giving or refusing instructions or in the admission or rejection of testimony. At all events we have not been able to discover any cause for complaint. The testimony amply sustains the verdict, and the cause was submitted fairly. As the action was based on the section of the statute making the company liable for all injury done to stock where the road was not properly

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inclosed with a lawful fence, there was no necessity for alleging or proving negligence. The law in such case raises the inference and implies negligence. (Wagn. Stat. 520, § 5, and cases cited in note 2.)

The main ground urged for a reversal is that the jury rendered a general verdict when they should have assessed the damages on each count separately. The whole course of our decisions establishes the practice that it is error to render a general verdict where the petition includes several distinct causes of action. (Mooney v. Kennett, 19 Mo. 551; Clark's Adm'x v. Hann. & St. Jo. R.R., 36 Mo. 215; Pitts v. Fugate, 41 Mo. 405; State *ex rel.* Collins v. Dulle *et al.*, 45 Mo. 269.) But it is also equally well established that if a party wishes to avail himself of the error, he must raise the objection and bring the matter to the attention of the court trying the cause, by an appropriate motion. (State, etc., v. Dulle *et al.*, *supra*; Clark's Adm'x v. Hann. & St. Jo. R.R. Co., *supra*.) Such a course was not pursued in this case. No objection to the form of the verdict or the finding of the jury was included in the motion. The point is now raised in this court for the first time. This practice is not permissible.

Judgment affirmed. The other judges concur.

DUDLEY C. COMINGS, Plaintiff in Error, v. HANNIBAL & CENTRAL MISSOURI RAILROAD COMPANY, Defendant in Error.

1. *Railroads — Fences, when must be erected by railroad companies building a road — When liable for damages.* — The reasonable construction of the statute relative to fencing lands adjoining railroads (Wagn. Stat. 310, § 43), is that it requires the corporations to have their fences built at least as soon as they commence running their roads; and, although, as a matter of law, it may not be that they are bound to erect fences before or while they are constructing their road through any particular landholder's premises, yet they must act with a prudent regard to the rights of others; and if lacking in this duty they are chargeable with negligence and must answer for the consequences. Thus they are bound while laying their road to use reasonable care to prevent the cattle of others from coming on the adjoining owner's fields and injuring him.

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2. *Railroads — Petition for damages — Allegation as to "road-bed" — Construction of statute — Demurrer — Double damages.*—In suit against a railroad company for damages to crops, caused by the failure of defendant to fence its line of road through plaintiff's premises, where it appeared from the petition that the company had constructed its "road-bed," but no allegation showed that the road was completed, *held*, that though the petition was not good as a pleading framed on the statute (Wagn. Stat. 310, § 43), it set forth a good cause of action at common law, and should be proceeded with. And as a common-law action it was not demurrable because it asked for a judgment for double damages. The character of a petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced in the issues.

Error to Hannibal Court of Common Pleas.

A. B. Wilson, for plaintiff in error.

I. The court erred in sustaining defendant's demurrer. The petition is sufficient under section 43 of the act in relation to railroad companies (Wagn. Stat. 310, § 43; *Cecil v. Pacific R.R.*, 47 Mo. 248.)

II. The petition is sufficient under the common law, if not under the statute, and the demurrer should have been overruled. (*Hewitt v. Harvey*, 46 Mo. 369.)

Thos. H. Bacon, for defendant in error.

I. The petition fails to aver that defendant's road existed, or that defendant has failed to erect or construct and maintain fences or cattle-guards on the sides of the road of defendant; but, on the contrary, invariably substitutes the expression "road-bed" for the statute language "road" and "railroad." No failure to comply with said statute is averred, and no cause of action thereunder is shown. (Gen. Stat. 1865, p. 342, § 43; Wagn. Stat. 311, § 43; *Clark v. Vermont*, etc., 28 Verm. 103; *Holden v. Rutland*, 30 Verm. 297, 306; 1 Chit. Pl. 371, note 4, 372; *Great Western R.R. v. Hanks*, 36 Ill. 281.) The aforesaid interpretation of the statute is supported by the passage in section 43, which dates the failure to erect fences from the "completion of the road," and not from beginning of construction. Moreover, there is no averment that defendant took possession of any land.

II. The petition not showing that plaintiff's inclosure was

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required by the statutes (Gen. Stat. 1865, p. 384, § 1; Wagn. Stat. 706, § 2; Moore v. White, 45 Mo. 206), or that the same was sufficient to keep out the animals, damage *feasant* (*id.*), or that plaintiff had used due care to exclude the animals—a fact necessary to be proved at common law (1 Hill. Torts, 126, and cases cited), and to be averred in code pleading (Wagn. Stat. 1012, § 3; Burdick v. Warrall, 4 Barb. 596)—and the petition, on the contrary, showing plaintiff's own negligence in leaving the inclosure open for two years, receiving the damage while he was in possession (Shearm. & Redf. Negl. 321, § 463, note 1; Waters v. Brown, 44 Mo. 302; Terry v. New York, etc., 22 Barb. 574), and no negligence of defendant or damage to plaintiff being averred, except that alleged to arise from defendant's failure to construct and maintain fences and cattle-guards along, etc., its "road-bed," a step which neither statute nor common law requires (Wagn. Stat. 311, § 43; Gorman v. Pacific R.R., 26 Mo. 441), the petition shows no cause of action either on the statute or at common law, in trespass on the case. (Gen. Stat. 1865, p. 379, § 2; Wagn. Stat. 1345, § 2.)

III. Grounds of demurrer are specified by saying that the petition does not state facts sufficient to constitute a cause of action. (Haire v. Baker, 5 N. Y. 357; Kent v. Snyder, 30 Cal. 666; Monette v. Cratt, 7 Minn. 234; Stanley v. Peeples, 13 Ind. 232.)

WAGNER, Judge, delivered the opinion of the court.

This case was determined in the court below by a demurrer which was sustained to the plaintiff's petition. It becomes, therefore, necessary to see whether the petition sets forth a cause of action. In substance, it recites that in June, 1869, plaintiff was the owner and in possession of a farm in Ralls county, at that time divided into fields suitable in size for cultivation, with crops of grass and grain growing thereon, and that the farm and fields were at that time inclosed with a substantial fence; that at the time above mentioned the defendant, a railroad corporation organized under the laws of this State, by its duly authorized agents, officers and employees, unlawfully and with force and arms,

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without the consent of plaintiff, entered into and upon the said inclosed and cultivated fields and farming lands, tore away the fences inclosing the same, and caused a road-bed for its railroad to be thrown up, cut and constructed through the same; that the defendant then left its road-bed without inclosing it with a good and substantial fence, and without constructing cattle-guards thereon where it passed through plaintiff's farm, as required by the statute; that by reason of such failure to erect suitable fences, etc., plaintiff's land was left unprotected and thrown open to the public, and all kinds of stock, cattle, etc., had access to the same, and trampled down his growing crops and damaged and destroyed them to the amount of \$250. There was then a prayer for double damages under the statute.

The main reason insisted upon to support the judgment of the court below, is that the facts alleged in the petition do not bring it within the purview of the statute compelling railroads to erect fences, and giving double damages in case of failure; that the petition simply speaks of a road-bed, while the statute contemplates a completed road. The statute makes it the duty of the corporation to "erect good and substantial fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed prairie lands, of the height of at least five feet, with openings and gates or bars therein, and farm-crossings of the road, for the use of the proprietors or owners of the lands adjoining such railroads, and also to construct and maintain cattle-guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad. Until such fences, openings and gates or bars, farm-crossings or cattle-guards, shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon such lands, fields or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle-guards." (Wagn. Stat. 310, § 43.)

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The statute does not definitely fix the period at which the fences and guards shall be erected. We think it is fair to presume that the first thing that the Legislature had in view was to avoid accidents which were so liable to happen by reason of stock getting on the track when the company were operating their road. This was the main and primary thing to be guarded against. It was then deemed prudent to go further for the protection of the land-owner, and required adequate inclosures and cattle-guards to keep out animals from their fields when they had been thrown open for the purpose of running the road. We think the reasonable construction of the statute is that it requires corporations to have their fences built at least as soon as they commence running their roads. This is the construction given to a similar law by the court of a sister State. (*Clark v. Verm. & C. R.R. Co.*, 28 Verm. 103.) This the policy of the law and reason alike require. Though we cannot say as matter of law that the defendants were bound to erect fences before or while they were constructing their road through any particular landholder's premises, yet we can say they must exercise their right with a prudent regard to the rights of others; and if lacking in this duty they are chargeable with negligence and must answer for its consequences.

While the petition is not good as a pleading framed on the statute, it nevertheless, in our opinion, sets forth a good cause of action at common law; and where such is the case the cause should be proceeded with. (*Hewitt v. Harvey*, 46 Mo. 368.)

It is always the duty of a person, while exercising his rights, to do as little harm to others as possible. And where a work is being prosecuted which necessarily interferes with the property rights of another, those carrying it on must be careful and prudent in protecting the interest of the owner. We cannot better express our views in regard to the matter than by adopting the language of the Supreme Court of Vermont: "The railroad company, after they have opened the fields of an adjoining landholder for work, and have begun constructing their road, are bound to use all reasonable and prudent means to restrain the cattle of the land-owner from straying from his land on to the railroad track,

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and to prevent the irruption of other cattle into his lands from their line of road. These are duties clearly devolving upon the railroad company. The landholder adjoining the line upon which the railroad company are constructing their road is not bound to fence his lands along the line of the railroad. If the company do not fence along such line before they begin to build their road, they must at least, while building it, use all reasonable and prudent measures to enable the landholder to enjoy the use of his own lands in the ordinary modes of husbandry, and to prevent irruption of the cattle of others upon his premises." (Holden v. Rutland & Burlington R. R. Co., 30 Verm. 297.)

The defendants, while constructing their road, were bound to use reasonable care to prevent the cattle of others from coming on the plaintiff's fields and injuring him. If they did not do so they are undoubtedly liable. If we treat the petition as embracing merely a common-law cause of action, it was not demurrable because it asked for a judgment for double damages. A demurrer should not be sustained because the petition asks for a judgment not warranted by the averments. The character of a petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced within the issues. (2 Wagn. Stat. 1054, § 12; Northcraft v. Martin, 28 Mo. 469; Easley v. Prewitt, 37 Mo. 361.)

The judgment must be reversed and the cause remanded. The other judges concur.

SAMUEL F. CRAWLEY, Respondent, v. AMOS MULLINS, Appellant.

1. *Landlord and tenant — Lease, construction of — Abandonment — Jury — Construction of lease not left to, when.*—A dwelling-house was leased solely on condition that the tenant should continuously occupy and run a saw-mill owned by the landlord. This was the sole consideration of the lease. The instrument contained no condition of forfeiture. *Held*, that an abandonment of the mill was an abandonment of the house, and, at the option of the landlord, terminated the lease.

In suit by the landlord for possession of the dwelling-house, the court should tell the jury what formed the consideration for the lease, as far as shown by the instrument, instead of leaving that point to be determined by the jury.

Appeal from Adair Circuit Court.

De France & Hooper, for appellant.

Defendant was in peaceable possession under a written lease for one year, and the lease cannot be construed as containing a clause of forfeiture. (*Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrison*, 17 Johns. 66; *Burns v. McCubbin*, 3 Kan. 221; *Tyler on Eject.* 286; *Taylor on Land. and Ten.*, §§ 277-8, 291.) Though there is a covenant to surrender in a certain event which takes place, yet the lessor cannot enter and expel the lessee unless the right of re-entry is reserved in the lease. (1 Washb. Real Prop. 321.)

Harrington & Cover, for respondent, cited in argument *Willison v. Watkins*, 3 Pet. 43; *Highland v. Wood*, 21 Ill. 470; *Leadbeater v. Roth*, 25 Ill. 587; 1 Washb. Real Prop. 363; *Schuisler v. Ames*, 16 Ala. 73; *McKinney v. Reader*, 7 Watts, 123; *Fortier et al. v. Ballance*, 10 Ill. 41.

BLISS, Judge, delivered the opinion of the court.

Action for unlawful detainer. The plaintiff had leased a saw-mill and dwelling-house to defendant for one year. No money rent was to be paid, but the lease was conditioned that the defendant was to run the mill in a careful and skillful manner; was to put in his and his boys' time against the capital invested in the mill, pay half the expenses of running, take care of tools and mill, etc.; in consideration of which the plaintiff was to furnish him the use of a dwelling-house, and the proceeds of the mill were to be divided between them. After running the mill a few months, the defendant went away, leaving his family in the house, and the plaintiff took possession of the mill. The defendant returned, remained a week or two, but did not go into the mill, and again left. The plaintiff then brought this action to obtain possession of the house.

There is no condition of forfeiture in the lease, and the action is based solely upon the ground of abandonment. The case was tried in the Circuit Court on appeal, and upon that point the

following instruction was given: "If the jury believe from the evidence that the plaintiff, on the 22d of February, 1869, leased to defendant his steam saw-mill and dwelling-house (the possession of which is involved in this suit) for one year, and that the inducement and consideration for the leasing of said dwelling-house was the leasing of said mill; and shall further believe that the defendant, on or about the 1st day of July, 1869, quit the possession of said mill with the intention to abandon the same, and did abandon the same, then the abandonment of said mill was an abandonment of said dwelling."

A number of instructions were asked by defendant and refused, most of which were correct in the abstract, but they did not pertain to the question developed, and if the above instruction be correct, the judgment must stand.

An abandonment of the premises under the circumstances must be held to terminate the lease. The benefit to the lessor depended entirely upon the continued occupation and running of the mill, and when it was deserted he had a right to enter and consider the term as ended by act of the lessee. It is analogous to, though stronger than, the case of an abandonment by the lessee from whom a money rent is due, without leaving goods upon the premises sufficient to answer the rent. In that case it is held that the lessor may let the term run out, and collect the rent if he can, or he may enter; in which case the lessee is responsible for rent only up to the time of entry. (*McKinney v. Reader*, 7 Watts, 123; *Schuisler v. Ames*, 16 Ala. 73.) In the last case it does not appear that the rent could not have been collected, and the court held that the landlord was not bound to let his premises lie idle and unoccupied, as it might be more injurious to him than to enter and lose the rent.

In the case at bar the court held that if the lease of the mill was the consideration for the lease of the dwelling-house, an abandonment of the mill was an abandonment of the dwelling.

The instruction is somewhat inartificial, but the jury were not misled and no injustice was done. The court should have construed the writing and decided what was the consideration for the lease of the dwelling-house so far as shown by the instrument,

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instead of leaving it to the jury. But the actual construction was right; possession of the property was given to enable the defendant to run the plaintiff's mill; there was no other consideration, and by abandoning the mill the substance of the lease was destroyed. A retention of the house would be a fraud upon the plaintiff, and he should be entitled to possession. In view of this controlling question, the others raised by appellant are unimportant, and the judgment is affirmed. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. DAVID H. HORNER,
Appellant.

1. *Criminal law—Uttering forged instrument, what constitutes.*—The offering of a forged instrument, with the representation by words or actions that the same is genuine, is an "uttering" within the meaning of the statute (Wag. Stat. 471, § 21), whether the paper be accepted or not.

Questions as to the uttering and the guilty knowledge on the part of the accused are for the jury to determine under the evidence.

2. *Venue—Question of, one of fact—What proof touching sufficient.*—The question of venue is always one of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which a prisoner is indicted was committed in the county where he is tried, it is sufficient. (State v. Burns, ante, p. 438, affirmed.)

Appeal from St. Louis Criminal Court.

John Hallum, for appellant.

I. The indictment was defective under the statute (Wagn. Stat. 468, § 9) in not charging anything touching the sale, exchange or delivery of the check, or any consideration passing.

II. There was no uttering of the check in a legal sense. It was simply deposited for safe-keeping. The hotel clerk was a mere bailee. There was no transfer for a consideration. The prisoner received from the clerk a deposit check, which gave him control of the paper. (See *Rex v. Harris*, 6 C. & P. 129; *Rex v. Shukard*, Russ. & Ryl. 200; see also *Gentry v. The State*, 3 Yerg. 451; *The People v. Rathbun*, 21 Wend. 508.)

III. The simple uttering of forged paper, uncoupled with proof of guilty knowledge or criminal intent, is not sufficient to

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support a conviction. (See 2 Russ. Crimes, 403 ; 2 Whart. Cr. Law, § 1472 ; State v. Mix, 15 Mo. 153 ; Rex v. Boulton, 2 Car. & Ker. 604.)

C. P. Johnson, Circuit Attorney, for respondent.

I. The indictment is good. (State v. Fealy, 18 Mo. 445 ; State v. Kroeger, 47 Mo. 562.)

II. The act of defendant was an uttering within the meaning of the statute. To constitute an uttering, the instrument forged should be parted with, or tendered or offered or used in some way to get money or credit upon it. (Russ. & Ryl. 212 ; 4 Taunt. 300 ; 2 Leach, 1048 ; 1 Bish. Cr. Law, § 185 ; 2 Bish. Cr. Law, § 499.) To utter and publish an instrument is to declare or assert, directly or indirectly, by words or actions, that it is good. (Commonwealth v. Searle, 2 Binn. 339 ; United States v. Mitchell, 1 Baldw. Ch. 367 ; East's P. C. 972 ; see also 3 Greenl. Ev., § 110 ; Regina v. Cook, 8 Car. & P. 582 ; 2 Russ. Crimes, 397-9 ; 1 Benn. & Heard's Lead. Cr. Cas. 397.)

III. The question of guilty knowledge or criminal intent is a question of fact for the jury, and such guilty knowledge need not be specifically proven, but may be inferred from all the facts and circumstances in the case.

WAGNER, Judge, delivered the opinion of the court.

The indictment in this case contained two counts. The first charged the defendant with forging and counterfeiting a certain check, and the second charged him with uttering, passing and publishing the same as true. The jury rendered a verdict of guilty on the second count, and he was sentenced accordingly.

Several questions have been argued by the counsel for defendant, but there are only two that deserve any particular consideration. The first is whether the act whereof the prisoner stands convicted constituted an "uttering" within the meaning of the law. The second count is framed upon the statute relating to forgery, which declares that "every person who, with intent to defraud, shall pass, utter or publish, or offer or attempt to pass, utter or publish as true, any forged, counterfeited or falsely uttered instrument or writing, or any counterfeit," etc., "shall,

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upon conviction, be adjudged guilty of forgery," etc. (Wagn. Stat. 471, § 21.) The prisoner presented to the clerk at the Southern hotel a forged check for \$200, and remarked that there was a check for \$200; that it was more money than he wanted to carry about his person; that it was payable to him and was all right, and requested the clerk to put it away for him and give him twenty dollars. The clerk states in his evidence that he supposed the check was good; that he put it away and gave the prisoner twenty dollars; that had he not received the check he would not have given the twenty dollars.

The law is well and definitely settled that the words "utter" and "uttering" mean substantially to offer. If a person offers another a thing—as, for instance, a forged instrument, or a piece of counterfeit coin which he intends to pass as good—that is an "uttering," whether the thing offered be accepted or not; and it is said that the offer need not go so far as to be in law a tender. But to constitute an uttering there must be a complete attempt to do the particular act which the law forbids; though there may be a complete conditional uttering as well as any other, which will be criminal. (1 Bish. Cr. Law, 1st ed., § 185, and cases cited in notes.) It has been expressly adjudged that the allegation of uttering and publishing is proved by evidence that the prisoner offered to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it was good. (Conn v. Searle, 2 Binn. 399; United States v. Mitchell, Baldw. Cir. Ct. 367; Rex v. Shukard, Russ. & Ryl. 200.) The uttering and the guilty knowledge are both questions of fact to be found by the jury upon the evidence submitted to them. It is not alleged that the court committed any error in the matter of giving instructions. The point raised was one for the jury to pass upon, and we think their verdict is amply sustained by the evidence.

The second question insisted on concerns the supposed failure of the prosecuting officer to prove the venue and show that the crime was committed within the jurisdiction of the court. In this respect the case is not distinguishable from *The State v. Burns*, ante, p. 438; and, according to the authority of that decision, the point must be ruled in favor of the State.

Judgment affirmed. The other judges concur.

FISKE, KNIGHT & Co., Plaintiffs in Error, v. MOSES LAMOREAUX
et al., Defendants in Error.

1. *Execution — Motion to quash — Parties.*—Whether any except parties to a record are entitled to submit a motion to quash an execution, questioned.
2. *Execution — Judgment, assignment of — Money paid in purchase of.*—Where the amount due on a judgment is paid by a third party as consideration for its assignment and not in satisfaction of it, the assignee may sue out an execution on the judgment.

Error to Washington Circuit Court.

G. I. Van Allen, for plaintiffs in error.

The motion of plaintiffs in error to quash was proper. (Parker et al. v. Waugh, etc., 34 Mo. 340.)

Louis F. Dinning, for defendants in error.

No one but the defendant in the execution can move to quash, and no one but the defendant in a judgment can move to set aside except in the case of judgments confessed, and then only for insufficiency of statement.

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding by motion to quash an execution. It appears from the record that the firm of Lamoreaux & Co., in November, 1869, recovered a judgment in the Washington county Circuit Court against one Lumpkin for \$2,369.50. An execution was issued and returned satisfied only in part, to-wit: \$500. September 13, 1870, an *alias* execution was sued out for the benefit and to the use of Andrew Casey, who had taken an assignment of the judgment.

This execution was levied on the real and personal property of the execution debtor. In October, 1870, the plaintiffs in error obtained a judgment against the same party, on which an execution was duly issued. On the 13th of October, 1870, their attorney appeared in court and filed a motion to quash the *alias* execution which had been issued to the use of Casey, alleging as the ground of the motion, that the judgment upon which the

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execution issued had been paid and satisfied through collections under the prior execution. The court overruled the motion, and Fiske & Co. bring the case into this court by writ of error, insisting that their motion ought to have been sustained.

It is questionable, to say the least of it, whether the plaintiffs in error were in a position to appear in the case where they were not parties of record and submit the motion in question. But waiving that point, I find, on looking into the record, that the action of the court below was justified by the state of the evidence. It appears that the Lamoreaux judgment was duly assigned to Casey by a writing bearing date May 10, 1870; that he paid the amount due on the judgment in consideration of the assignment and as a purchaser, and not in the way of extinguishing the judgment.

Lamoreaux's attorney, who is chiefly relied upon to prove the alleged satisfaction, and to whom Casey paid the money, is not able to state that Casey paid a dollar prior to the assignment. He is not certain on that point. There seem to have been several payments. It appears that Casey interposed in the matter in aid of Lumpkin, and procured some delay, assuring the sheriff verbally that he (the sheriff) should not suffer thereby; that he (Casey) would indemnify him.

The whole transaction shows that Casey looked to the judgment as a security for the advances which he ultimately made; that he made these advances as a purchase and not with a view to the satisfaction of the judgment. Lamoreaux & Co. did not regard the judgment as paid by Casey, as their assignment of it shows. The assignment particularly provides for an enforcement of the judgment by Casey, and at his own risk and cost, and the assignment was made a number of months before the plaintiffs in error obtained their judgment. I see no adequate ground for disturbing the order of the court overruling the motion to quash.

Judgment affirmed. The other judges concur.

McPike et al. v. Pew et al.—Wright v. Dyer.

B. F. McPIKE *et al.*, Appellants, *v.* R. C. PEW *et al.*,
Respondents.

1. *Injunction—County collector—Void levy—Trespass.*—A collector cannot be enjoined from enforcing the collection of a tax on a void levy. In such case the officer would be a mere trespasser, and the injured party would have an ample remedy at law.

Appeal from Louisiana Court of Common Pleas.

Fagg and Dyer, for appellants.

Caldwell, Biggs and Robinson, for respondents.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff instituted these proceedings to enjoin the collection of a special tax levied by the County Court of Pike county. They aver in their petition that the levy was "wholly unauthorized and void." This averment states the case out of court, for if the levy was void, it clothed no one with even a color of right to enforce the collection of the tax. An officer seizing property under such void tax levy would be a mere trespasser, and the injured party would have an ample remedy at law. The remedy by injunction is not applicable to the facts stated in the petition. (Sayre v. Tompkins, 23 Mo. 443; Barrow v. Davis, 46 Mo. 394; Hopkins v. Lovell, 47 Mo. 102.)

Judgment affirmed. The other judges concur.

HENRY C. WRIGHT, Defendant in Error, *v.* DAVID P. DYER.
Plaintiff in Error.

1. *Promissory notes—Guaranty—Notice not necessary to render guarantor liable, when.*—The words "I assign the within note to A. for value received, and guaranty its prompt and full payment," indorsed by the payee on the back of the note, impose upon the assignor an absolute obligation to pay, and no demand or notice of the maker's default is necessary to render him liable.

Error to Warren Circuit Court.

Fagg & Dyer, for plaintiff in error.

I. The contract of the guarantor was conditional. It was the holder's duty to demand payment of the makers, and, on their refusal, to notify the guarantor (Sto. Prom. Notes, § 472; 2 Pars. Cont. 174; Rankin v. Childs, 9 Mo. 674); or if, by reason of the maker's insolvency, no demand or notice were required, the fact of his insolvency should appear from the petition. (Sto. Cont., § 871; Lewis v. Brewster, 2 McLean, 21; Foote v. Brown, *id.* 369.)

II. The contract of the guarantor implies the condition that the holder shall use all proper and reasonable means to compel payment from the principal. (Sto. Cont., § 871.)

L. J. Dryden and *A. H. Buckner*, for defendant in error.

I. By virtue of the indorsement defendant became personally bound to pay the note. (Sto. Prom. Notes, § 63; 19 Mo. 193; 41 Mo. 50; 12 Mo. 538.)

II. The contract of defendant was absolute and not conditional. He made himself responsible as maker. (Airey v. Pearson, 37 Mo. 424; Allen v. Rightmere, 20 Johns. 364.) Hence, there was no necessity for diligence in making collection, or for notice of non-payment of the note by the maker.)

CURRIER, Judge, delivered the opinion of the court.

The defendant is sued upon the following contract, indorsed upon the back of an over-due promissory note payable to himself: "I assign the within note to Henry C. Wright, for value received, and guarantee its prompt and full payment. September 22, 1864. (Signed) David P. Dyer, Adm'r of the estate of G. W. Dyer, deceased."

It is not claimed that this is other than a personal contract. The defense is that the contract was conditional and not absolute, and consequently that the holder should have shown diligence in his endeavors to collect of the maker, and that the defendant was entitled to notice of the maker's default.

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The contract was absolute, and no demand or notice of effort to collect of the maker was necessary in order to fix the assignee's liability. In *Allen v. Rightmere*, 20 Johns. 364, the words of the assignment were: "I sell, assign and guarantee the payment of the within note." The court held that the contract imposed upon the assignor an absolute obligation to pay, and that no demand or notice was necessary to fix this liability. This decision was cited and relied upon as an authority for the decision of this court in *Airey v. Pearson*, 37 Mo. 424. Indeed, *Airey v. Pearson* seems to be decisive of the present case. See the various authorities cited in the opinion of the court.

Judgment affirmed. The other judges concur.

THOMAS UNDERWOOD, Defendant in Error, v. JAMES UNDERWOOD
et al., Plaintiffs in Error.

1. *Contracts — Specific performance — Action on parol contract of sale by coparcener — Proof, what essential.* — In action for specific performance of a parol agreement for the sale of real estate, where plaintiff claimed to have gone into possession under the agreement, but was theretofore already in constructive possession, it should appear that after the agreement, acts were done with the privity of the owner of the fee which were inconsistent with the previous holding, and such as to clearly indicate a change in the relations of the parties. And so in an action of this sort by one formerly a coparcener in the land, evidence showing that after the agreement the other coparcener had abandoned his claim; that plaintiff held adversely to him and made valuable and lasting improvements, not expected from his relation to his coparcener, would be important in making out his case.

In such suits the contract should be established by competent proof, and be clear, definite and unequivocal in all its terms. And the declaration even of living parties in regard to it should be cautiously received, much more so those of parties deceased. To be entitled to weight, the latter should receive other support.

Error to Mississippi Circuit Court.

Houck, Waide & Watkins, for plaintiffs in error.

I. To avail him, plaintiff's change of possession must be unequivocal. The occupancy of a tenant after parol contract of sale amounts to nothing. (*Price v. Hart*, 29 Mo. 173; *Spaulding*

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v. Conzelman, 30 Mo. 182; Browne on Frauds, 477.) The case must be such as would make plaintiff a trespasser unless specific performance were decreed. (Sto. Eq., § 896.) Here plaintiff was a coparcener and could not be a trespasser.

II. Plaintiff's improvements were unimportant and naturally reconcilable with a continuance of the old relation. (Spaulding v. Conzelmen, *supra*; Brennan v. Balin, 2 Dru. & War. 349.)

III. The terms of the contract must be established by competent proof, otherwise specific performance will not be decreed. (Sto. Eq., §§ 764-7.)

N. Myers, for defendant in error.

I. Proof of plaintiff's possession after the alleged contract, is supported by that of the statement of Joseph Underwood, that he had put plaintiff in possession and that he would make him a deed as soon as he had time.

II. To authorize specific performance, the case need not be such that the claimant would be a trespasser unless performance were decreed. If so, a coparcener never could procure the decree.

III. The improvements were of sufficient importance.

BLISS, Judge, delivered the opinion of the court.

The plaintiff, Thomas Underwood, Joseph H. Underwood, deceased, and one Albert Underwood, were brothers, and children of Thomas Underwood, deceased, who died seized of the land in controversy. The petition charges that during the life of said Joseph H. the plaintiff purchased by parol and paid for his interest in the property; that he took possession under the purchase and made valuable improvements; that his brother promised to make a conveyance of his interest, but died without having done so; and a specific performance is asked for. The case went to trial and the plaintiff obtained judgment.

Counsel for defendants claim, first, that, inasmuch as the plaintiff was a coparcener, he was always constructively in possession, and no such possession could be given him as would constitute an act of part performance.

The continued possession of one who had been in actual occupation before the alleged contract, or the taking actual possession by one who had been constructively in possession as tenant in common with the right of corporal entry, is not so easily shown to be an act of part performance as though it were delivered to and taken by a stranger. In actions for specific performance it is held that the possession, or possession in connection with the payment, creates the equity, and in order to sustain a bill it should be referable exclusively to the agreement. (Browne on Frauds, §§ 457, 476; 1 Johns. 149.) It is obviously more difficult to show such reference when the possession might be otherwise rightful than if the party would be a trespasser, but for the contract. It does not of itself indicate any contract whatever; does not, as would be the case with a stranger, point to one with which it might harmonize. In the case of a stranger the entry itself is evidence of some agreement, or he would be a trespasser. What that agreement is must be otherwise shown, for it may be a mere license; but it is otherwise with one in rightful occupancy without an agreement. Yet one in possession, whether actual or constructive, should not hence be deprived of the benefit of a parol agreement, if the continued possession can be shown to be held under it. But the agreement itself will not suffice to show the *quo animo*, if it is not continued, any more than the possession will show an agreement. In petitions of this kind there must be positive indications of a change of relations. Thus, in cases where a tenant continues in possession under an alleged agreement for a new tenancy, the purpose is answered by proof of any *act* on his own part, done with the privity of the owner of the fee, which is inconsistent with the previous holding, and is such as clearly indicates a change in the relation of the parties—as when he makes improvements upon the premises, this fact is of great weight to show a change in the holding. (Browne on Frauds, §§ 478, 480.)

And in the case at bar, if it should appear by evidence independent of that proving the contract, or in addition to such proof, that the deceased abandoned his claim to the land as a coparcener, and that the plaintiff took and held possession under the

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contract and adversely to him, and if the plaintiff, having so entered upon the premises, has made valuable and lasting improvements, not expected from his relation as coparcener, it would have great weight in showing the character of his holding and in strengthening his equity. But "it is not only indispensable that the acts done should be clear and definite and referable exclusively to the contract, but the contract should also be established by competent proof, and be clear, definite and unequivocal in all its terms." (Sto. Eq., § 764.)

In this regard the present record signally fails, for the extent of the purchase does not appear. The petition calls for land in three different sections, and eighty acres in one section must be half a mile at its nearest point from any of the rest of the land. The witnesses do not describe the property, but only speak of it as the home farm, and there is no evidence that all this land was included in the home farm. There is nothing otherwise to show, or that tends to show, what was embraced in the contract. Hence the evidence fails in the definiteness that would pertain to a written instrument. The evil to be guarded against, and which prompted the statute, is not only the temptation to fraud and perjury, but the liability to mistake in trusting to the memory as to the extent and details of the contract; and if it is enforced at all, there should be no doubt as to its terms, and especially as to the property embraced in it.

But not only is there this lack of precision as to the property, but the evidence of the contract itself is inconclusive. It consists wholly of the declarations of the deceased. Several witnesses testify that they heard him say that he had sold the place to his brother and received his pay; some speak of an exchange and paying for the difference, but what was exchanged does not appear. No one saw them together making the negotiation; there is no other evidence that any money passed between them, or that either had the amount about the time of the transaction under circumstances pointing to it; nor do I find anything to sustain the alleged declarations except the possession of the plaintiff; and that, as we have seen, can be otherwise accounted for. On the other hand, declarations of the plaintiff are given incon-

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sistent with his claim, and no reasons are shown why the deceased delayed so long the fulfillment of the contract.

While evidence of declarations of parties is admissible, it should always be cautiously received, even while they are living, and in respect to agreements not required to be in writing. It has less weight when the parties are dead and can neither contradict nor explain them, and especially concerning a class of contracts that require unequivocal proof. Thus, when a resulting trust is claimed, as arising from the purchase of land by a deceased person with funds of the claimant, evidence of the declarations of the deceased is deemed inconclusive in its character unless supported by circumstances. (*Johnson v. Quarles*, 46 Mo. 423.) So, in establishing a contract like the one under consideration, it is doubtful, when established, whether equity should enforce it; but that question will not be considered until the existence of the contract is satisfactorily shown. Less conclusive evidence will suffice when possession is given under the agreement, for the possession itself tends to show some kind of an agreement; but when the possession may be otherwise accounted for, the declarations of deceased persons should receive some other support. There is room for doubt whether the evidence is fully spread out in the record. There is ambiguity in the report of the testimony of the principal witness, and there are other indications that the facts are not fully developed.

In reversing the judgment the case will be remanded for a new trial. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. JOHN S. HEALY,
Appellant.

1. *Criminal law — Embezzlement — Agency — Purchase of land with title in abeyance.*—An agent who converts to his own use money intrusted to him by his principal for the purchase of land, is guilty of embezzlement. And the case is not altered by reason of the fact that the land contracted for proved to be in litigation, and that the title was for that cause in abeyance.

Appeal from St. Louis Criminal Court.

J. C. Moody, with whom were *Hunter* and *Macdonald*, for appellant, cited 2 Bish. Cr. Law, § 280-315; 2 Russ. Crimes, 167-72; 5 Denio, 76; 7 and 8 Geo. IV, ch. 29, § 47; 6 Conn. 9; 3 Paine, 423; 7 Paine, 833; 3 Carr. & P. 422; 7 Carr. & P. 281; 14 Eng. Com. Law Rep. 277; 22 *id.* 759; 41 *id.* 274; 47 *id.* 63.

C. P. Johnson, Circuit Attorney, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted of the crime of embezzlement. It seems that he was an examiner of titles and negotiator of loans, and, as such, undertook to purchase a lot for one Tobin. He contracted for the lot at the sum of \$4,000, and as Tobin did not have the money to pay for the same, defendant negotiated a loan for that amount, and Tobin secured its payment by executing a deed of trust on certain property which he owned. This deed of trust defendant took and placed on record, and still retained the money in his hands. After concluding the contract for the purchase of the lot it was discovered that there was a defect in the title, and so the contract could not be consummated and carried out. Healy, the defendant, kept the money which he had borrowed for Tobin, and refused to pay it over to Tobin, and admitted that he had met with some misfortune, and used the money for his private benefit. When the note that Tobin gave for the loan became due, he was unable to pay it, and his property was sold under the deed of trust. The title to the lot was in litigation, and whether the contract of purchase could ever be completed depended upon the event of the suit. The only ground now urged for a reversal is that the defendant could not legally be convicted because there was no one rightfully entitled to receive the money. But this is clearly a mistake. As the person who sold the lot could not make a title he could not receive the money and had no claim to it. The money was then the absolute property of Tobin, and should have been paid over

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on demand, and defendant's refusal to pay and conversion of the money rendered him liable. He was the agent and employee of Tobin, and accountable to him only. It was no concern of his what the relations of the vendor of the lot and Tobin might subsequently be. He had Tobin's money, and he illegally kept and converted it to his own use. There is obviously no error in the record.

Judgment affirmed. The other judges concur.

TERRENCE BRADY *et al.*, Plaintiffs in Error, v. ELI ERVIN,
Defendant in Error.

1. *Practice, civil—Actions for malicious prosecution—Proof of arrest and bail not essential to.*—A civil suit, instituted and prosecuted without probable cause and maliciously, lays a good foundation for a suit for damages, although no arrest attended the prosecution of the malicious suit.

Error to Cape Girardeau Court of Common Pleas.

Louis Brown, for plaintiffs in error.

Proof of arrest and bail are not essential prerequisites to the present action. (*Pangburn v. Bull*, 1 Wend. 346; *Besson v. Southard*, 10 N. Y. 236; *State, to use of Roe, v. Thomas*, 19 Mo. 617; *Alexander v. Harrison*, 38 Mo. 258.) A malicious and groundless institution of legal proceedings of any kind, under circumstances of special damage, or raising a legal presumption of damage, is actionable. (*Davis v. Gully*, 2 Dev. & Bat. 360-3; *Grove v. Bradenburg*, 7 Blackf. 234; *Mower v. Miller*, 3 Leigh, 561; *Perdu v. Connerly*, Rice, 49; *Farmer v. Darling*, 4 Burr. 1971-4; *Sutton v. Johnston*, 1 T. R. 493; 1 Brown's P. C. 76; *Williams v. Taylor*, 6 Bing. 183, 188; 2 Barn. & Ad. 857-9; *Mitchell v. Jenkins*, 5 Barn. & Ad. 594; *Musgrove v. Newell*, 1 Mees. & W. 585, 587.)

Nor is it always necessary that the whole proceedings be utterly groundless; for if groundless charges are maliciously and without probable cause coupled with others which are well founded,

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they are not on that account the less injurious, and therefore constitute a valid cause of action. Nor is the form of the prosecution material; the gravamen being that the plaintiff has improperly been made the subject of legal process to his damage. (*Reed v. Taylor*, 4 Taunt. 516; *Wood v. Bulkley*, 4 Coke, 14; *Pierce v. Thompson*, 6 Pick. 193; *Stone v. Crocker*, 24 Pick. 81; *id.*, §§ 452-3, note 6; *id.* 454, 456, note 4; *id.* 459, 415, note; *Stephens v. Fassett*, 14 Shep. 266.)

G. H. Green and *L. Houck*, for defendant in error.

Action will not lie for groundless civil suit when there has been no arrest. (*Savil v. Roberts*, 1 Salk. 14; 1 B. & P. 205; *Selw Nisi Prius*, 1077; 1 Gow. C. N. P. 20; *Parcell v. McNamara*, 1 Campb. 203; *Warren v. Mathews*, 6 Mod. 73; *Godlin v. Wilcock*, 2 Wilson, 305; 1 Espin. 80; 3 Bing. 297; 2 Chit. Pl. 600, note k.)

It is not denied that an action will lie for a malicious abuse of the process of the court. But this is not such a case. Here two suits were brought to admeasure dower. It is conceded that if an attachment process had been made out maliciously the action would lie. The case of *State v. Thomas*, 19 Mo. 617, and *Alexander v. Harrison*, 38 Mo. 228, establish that. The case of *Pangburn v. Bull*, 1 Wend. 346, was a case for the abuse of the process of the court. (See also *Am. Lead. Cas.*, note 2.)

CURRIER, Judge, delivered the opinion of the court.

This action was brought to recover damages for alleged malicious and groundless prosecution of a civil suit, or rather succession of civil suits. The petition is demurred to as showing no cause of action, in this: that it fails to allege any arrest or holding to bail. The demurrer is based upon the assumption that an action to recover damages for a malicious prosecution of a civil suit can alone be maintained where there is shown to have been an arrest in the suit charged to have been malicious and without probable cause. The old authorities, originating at a time when arrests and imprisonment for debt were common, may lend support to that view; but the more modern decisions bear in an

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opposite direction. If an arrest were an indispensable condition to the maintenance of the action, then, with us, an action would not lie at all for a malicious prosecution of a civil suit, however mischievous its consequences might be; since arrests and imprisonment in civil causes are not tolerated by our laws. The injured party would be without remedy, however serious his grievance, if the ground taken by the defendant was sustained. The justice of the law does not leave parties in that condition.

In *Pangburn v. Bull*, 1 Wend. 345, it was distinctly decided that an arrest and holding to bail in a civil suit was not necessary to the maintenance of an action for a malicious prosecution of a civil suit. In that case the court say: "If the action has been sustained where there was neither an arrest nor bail, and when it is considered that malice and the want or probable cause are the foundation of the action, it would seem, on principle, to reach cases where the injury would be equally great, although the proceeding did not require an arrest or bail." Substantially the same view was taken by this court in *Alexander v. Harrison*, 38 Mo. 258. The suit under review in that case was an attachment suit, but the court say: "The case here must depend upon the right to sue at all upon these notes, and the malice and want of probable cause must consist not merely in taking out the process of attachment where they were not entitled to have that process, but in suing the plaintiff here at all on these notes, and using the attachment process in aid of his suit, when there was no cause of action against him." It was not the attachment, as an incident to the suit, that the court lays stress upon, but the malice and groundlessness of the suit itself. (See also *State v. Thomas*, 19 Mo. 613.)

We are of the opinion that a civil suit instituted and prosecuted without probable cause and maliciously, lays a good foundation for a suit for damages, although no arrest attended the prosecution of the malicious civil suit. In that view the demurrer was improperly sustained, and the judgment will be reversed and the cause remanded. The other judges concur.

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CHARLES A. LAGROUE *et al.*, Appellants, v. JOHN RAINS *et al.*,
Respondents.

1. *Revenue — Tax deed — Printed notice of sale of delinquent lands required, when — Construction of statute.* — The putting up of written instead of printed notices of the sale of land for non-payment of taxes is not a sufficient compliance with the first clause of section 2, page 85, Adj. Sess. Acts 1863; and a tax deed which recites simply the posting of written advertisements is void and conveys no title. Advertisement in the time and manner prescribed by law is a prerequisite to the validity of a tax title, and this principle is not altered because judgment is required by law to be entered up in the County Court. The notice is the indispensable prerequisite, and without it the court has no jurisdiction in the premises.

Appeal from Schuyler Circuit Court.

A. J. Baker, for appellants.

The posting of written handbills was insufficient. (*Abbott v. Lindenbower*, 42 Mo. 162; *Blackw. Tax Tit.* 215; *Williams v. Payton*, 4 Wheat. 79; *Barker v. Rule's Lessee*, 9 Cranch, 64; *Garnett v. Wiggins*, 1 Scam. 337; *Fitch et al. v. Pickard et al.*, 4 Scam. 69; *Pope & Hammer v. Hayden*, 5 Ala., N. S., 433; *Scales v. Alvis*, 12 Ala. 617; *Hughey v. Horrell et al.*, 2 Ham. 231; *Mills v. Walker*, 4 Mich. 641; *Styles v. Weir et al.*, 26 Miss. 189; *Brown v. Veazie*, 25 Me. 359; *Curlew v. Hayden*, 1 Verm. 359; *Young v. Martin*, 2 Yeats, 312; *Porter v. Whitney*, 1 Greenl. 306; *Pierce v. Sweester*, 2 Carter, 649; *Tidd v. Smith*, 3 N. W. 178.) The deed, showing as it does that the notice required by law has not been given, is void upon its face. (*Moore v. Browne et al.*, 4 McLean, 211; *Farrar v. Eastman*, 10 Me. 191.)

McGoldrick & Haywood, with *Noble & Hunter*, for respondents.

The terms of the proviso in section 2, p. 85, Adj. Sess. Acts 1863, do not require a "printed notice." Nor is a printed notice more requisite than a printed list, which is the essence of the notice and might be printed.

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The Legislature evidently intended to provide for a written notice when a printed one was impracticable, as was the case in many counties during 1864. As to a title acquired by purchase at tax sale and its effects, see *Stewart v. Parish*, 6 Ohio, 474; *Wallace v. Seymour*, 7 Ohio, 156; *Renick v. Wallace*, 8 Ohio, 539; *Douglas v. Dangerfield*, 14 Ohio, 522; *Milliken v. Sterling*, 16 Ohio, 61; *Gwynne v. Niswanger*, 15 Ohio, 366; *Abbott v. Lindenbower*, 46 Mo. 291.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs brought their action in ejectment to recover the possession of certain lands lying in Schuyler county, and adduced a regular chain of title from the general government.

The defendants derived title and relied exclusively on a tax deed made by the county collector, on a sale of the land for delinquent taxes. On the trial no declarations of law or instructions were asked or given, and consequently there is nothing preserved in the record that we can review, except an objection made to the ruling of the court in admitting evidence. The court permitted the introduction and reading in evidence of the tax deed, against the objection of the plaintiffs, and this is the only error that we can notice. The only recital of any advertisement in the deed is that the collector proceeded by posting, in the most public place in each municipal township, one *written* notice containing a list of the land and the amount of taxes due and unpaid thereon, and for what years, etc.

The revenue law under which this land was attempted to be sold provides that "it shall be the duty of the collector to publish an advertisement in some newspaper published in his county having the greatest circulation, if any such paper there be; and if there be no such paper published in his county, then in the nearest newspaper in this State having the greatest circulation, which advertisement shall be once published, or, if so ordered by the County Court, by posting no less than one *printed* handbill or advertisement in each municipal township in the county where the lands are situate." There is then an alternative provision, "that if, for any cause, the collector shall be unable to make the adver-

tisement and notice aforesaid, such list may be published by one printed or written list, together with the notice above required, posted up at the door of the court-house in said county," etc. (Adj. Sess. Acts 1863, p. 85, § 2.)

There is no pretense that an exigency arose which authorized the collector to act, or that he attempted to act under this latter clause. It is not shown that he posted up any notice at all at the court-house door. But the fact plainly appears from the recital, and is admitted and undisputed, that the advertisement was made in pursuance of the provision which empowered the collector to give the requisite notice by posting up handbills in a public place in each municipal township. The question presented for our decision, then, is whether the putting up of written notices was a sufficient compliance with the law.

The proposition may be laid down as undoubted, that the advertisement, in the time and manner prescribed by law, is prerequisite to the validity of a tax title; and this principle is not altered by the provision in our law requiring judgment to be entered up in the County Court. Before the adoption of the present law, the officer derived his power to sell, in part, from the advertisement. Now the court obtains its authority to proceed, in part, from the same source. Power is conferred upon the court, to be exercised on certain defined and limited contingencies; and these contingencies must have happened, and the conditions on which it can act must have been performed, before its act can be valid. Its authority does not attach until the law has been pursued and complied with. The notice is the indispensable prerequisite, and without it the court has no jurisdiction in the premises. As the proceeding is *ex parte* and founded upon constructive notice, a strict compliance with the law by which the court acquires jurisdiction is necessary. When the law prescribes a particular or specific manner for making advertisements or giving notices, no court or officer has a right to substitute another or a different mode. The law required that the handbill set up should be printed. Here the requirement was wholly disregarded, and written handbills were substituted.

There are doubtless good and sufficient reasons why the notices

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should be printed. Some persons can read printing who cannot read writing. Printed notices are calculated to attract more attention, impart a more general information, and give greater facility for examining into what land is to be sold or has become delinquent. Everything that has a tendency to inform the community and promote competition in these sales is essential.

But, without giving reasons, it is sufficient for us to know that the law absolutely demanded that the handbills posted up should be printed, and that the officers disregarded and disobeyed its express mandates. If they could make one kind of substitution they could another, and no person could ever know how or where to look for the protection of his rights.

The court erred in admitting the deed in evidence. Upon its face it showed that the law had not been complied with, and that it was void and conveyed no title. For this error the judgment will be reversed and the cause remanded. The other judges concur.

WILLIAM C. RANNEY, Respondent, v. HERMAN BADER, Appellant.

1. *Practice, civil—Verdict—Counts—Causes of action.*—Where a petition contains two counts, each embracing a separate cause of action, a general verdict is erroneous. But where the two counts embraced the same cause of action, and plaintiff elected to rest upon one of them, a verdict responsive to that count is proper.
2. *Practice, civil—Verdict—Surplusage, what may be treated as.*—In rendering judgment on a verdict, the court should reject as surplusage that part of the finding which fixes the amount of interest. It is never held to be error to reject as surplusage any statement in a verdict that does not affect the real finding, and enter judgment upon such finding.

Appeal from Cape Girardeau Circuit Court.

G. H. Green, with T. C. Fletcher, for appellant.

The verdict was not merely informal, but defective. It was not certain, positive and free from ambiguity. Hence it was void. (3 Gra. & Wat. N. T. 1378, 1380-2; Murray v. King, 8 Ired. 528.) It was not responsive to the issues. (Gra. &

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Wat. N. T. 1384 *et seq.*) The clerk could not make the motion to elect part of the record. (United States v. Gamble, 10 Houck, 459.)

L. Houck, for respondent.

The order of court compelling plaintiff to elect was a part of the record. (Mortland v. Holton, 44 Mo. 64.) The verdict was good. (State v. Rombauer, 44 Mo. 594. The finding as to interest was surplusage. (State v. Knight, 46 Mo. 84; Dunlap v. Hayden, 29 Ind. 303.) A court will not disturb an irregular verdict, where justice has been done—(3 W. Bl. 1221) where it is certain what the jury intended (Hawks v. Cupton, 2 Burr. 698)—upon a merely formal objection. (Cogswell v. Brown, 1 Map. 237.) The cases of Murray v. King, 8 Ired. 52, and Dozier v. Jarman, 30 Mo. 220, are really in point for respondent.

BLISS, Judge, delivered the opinion of the court.

This suit was brought for damages for taking personal property, and the judgment is objected to by defendant in consequence of alleged indefiniteness in the verdict.

1. There were two counts in the petition, and a general verdict was given for the plaintiff. Under our system, which requires, when more than one cause of action is being prosecuted, that each cause be separately stated, and with the relief sought, so as to make a complete petition of itself, it is held that the verdict must be responsive to each statement, and that a general verdict is erroneous. (Brownell v. Pacific R.R. Co., 47 Mo. 239, and cases cited.) But this petition evidently contained but one cause of action in two counts, and for that reason the plaintiff was ordered by the court to elect upon which count he would proceed. He elected to rest upon the second, and hence the verdict is only responsive to the cause of action stated in that count.

2. The verdict itself is alleged to be indefinite. It is as follows: "We, the jury, find for the plaintiff, and assess his damages at \$293, with six per cent. interest." Upon this verdict the court rendered judgment for \$293, saying nothing about the

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interest, treating that part of the verdict as surplusage. The correctness of this action of the court is manifest, for the law fixes the interest in accordance with the verdict; and the finding in that regard did neither good nor harm. In *Dozier v. Jarman*, 30 Mo. 216, a similar verdict was rendered, except that interest was to be computed from a past day, and the trial court rendered judgment for a sum which included the amount found by the jury and such interest. This court held the judgment to be erroneous, and that, though interest might be allowed, if allowed it should be included in the estimate of damages; but, disregarding so much of the verdict as related to interest, proceeded to render judgment for the amount specifically assessed, precisely as was done below in the case at bar.

The general principles of law urged by appellant's counsel in relation to certainty required in verdicts are correct, but they were not disregarded in this judgment. It is common to reject as surplusage any statement in a verdict that does not affect the real finding, and enter judgment upon such finding, and to do so has never been held to be error. (*State v. Knight*, 46 Mo. 83.)

Judgment affirmed. The other judges concur.

WILLIAM J. PRESTON, Plaintiff in Error, v. THE MISSOURI AND
PENNSYLVANIA LEAD COMPANY, Defendant in Error.

1. *Judgment — Costs — Appeal.*— A judgment for costs will not support an appeal or writ of error.

Error to Washington Circuit Court.

Emmerson & Dillingham, with *L. F. Dinning*, for plaintiff in error.

Reynolds & Relfe, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The record in this case shows no final judgment in the court below. The plaintiff, under certain rulings of the court, took a nonsuit with leave to move to set the same aside, and the only

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entry of judgment is: "Therefore it is considered by the court that the said defendant have and recover of the said plaintiff its costs in this behalf expended, and that execution issue therefor." This is simply a judgment for costs, and will not support an appeal or writ of error. (*Bogges v. Cox, ante*, p. 278.)

Let the writ be dismissed. The other judges concur.

JAMES M. FULLERTON, Plaintiff in Error, v. ANDREW KELLIHER,
Defendant in Error.

1. *Judgment — Amount recovered stated in numbers, effect of.*— *Semble*, that a judgment expressing the amount recovered simply in figures, in combination with the dollar-mark, thus "\$121.00," is not, within the meaning of the statute (Gen. Stat. 1865, p. 583, § 15; Wagn. Stat. 420, § 15), absolutely void and of no avail in a collateral proceeding.

Error to Cape Girardeau Court of Common Pleas.

One Jordan sued Fullerton, plaintiff in this case, by attachment before a justice, wherein Kelliher, present defendant, being garnished, admitted an indebtedness of \$121.00, less attorney's fees; and for this sum judgment was rendered against him.

See further the opinion of the court.

L. Brown, for plaintiff in error, cited *Goodall v. Harrison*, 2 Mo. 124; *Lisle v. Rhea*, 9 Mo. 173; *Jones v. Hoppie*, 9 Mo. 173; Gen. Stat. 1865, p. 538, § 15; *id.* 577, § 38; *Young v. Stonebraker*, 33 Mo. 117; *Smarr v. McMasters*, 34 Mo. 204.

Dennis & Wilson, for defendant in error.

Section 15, p. 839, Wagn. Stat., remedies all defects as to the entry of judgment.

Such a judgment cannot be attacked in a collateral proceeding. The garnishee could discharge himself at any time by paying over the amount to the constable. (Wagn. Stat. 669, § 35.)

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CURRIER, Judge, delivered the opinion of the court.

As a defense to the plaintiff's suit the defendant shows by his answer that he paid the amount claimed, less his fees in a garnishment proceeding against the plaintiff, in which the present defendant was summoned as garnishee. Transcripts from the justice before whom the proceedings were had were given in evidence to prove the averments of the answer. These transcripts were objected to as evidence, upon the ground that they failed to prove, as the plaintiff insists, the rendition of a valid judgment either against the garnishee or against the principal defendant in the garnishment suit. The judgments as to their amounts were expressed in figures in combination with the dollar-mark, thus "\$121.00." This is claimed not to be in compliance with the statute (Gen. Stat. 1865, 538, § 15) requiring judicial records to be written in the English language; and on that view the plaintiff bases his objections to the transcripts. The transcripts may be imperfect and objectionable in the particular named, but we are not disposed to hold that the defect was of a character to render the judgment absolutely void and of no avail in this collateral proceeding. Besides, it was not necessary for the garnishee to delay payment until a valid judgment should be rendered. He was at liberty, in discharge of himself, to pay over the money in his hands to the constable "at any time before final judgment against him." (Wagn. Stat. 669, § 35.)

The judgment of the court below was for the right party and will be affirmed. The other judges concur.

JOHN C. MOORE *et al.*, Plaintiffs in Error, v. GEORGE W. WHITCOMB, Defendant in Error.

1. *Corporations — Railroad — Dissolution — Act to foreclose the State's lien.*

— A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its right.

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2. *Corporations — Railroads — Cairo & Fulton Railroad, seizure and sale of.* — The seizure and sale of the Cairo & Fulton Railroad under the State lien extinguished the Cairo & Fulton Railroad Company, such seizure and sale destroying the objects for which the corporation was instituted (Answers to questions, etc., 37 Mo. 135, cited and affirmed.)

Error to Mississippi Circuit Court.

Polk, Causey & Drake, for plaintiffs in error.

I. By section 19, p. 329, Gen. Stat. 1865, it is expressly provided that on the dissolution of a corporation the officers of it are trustees for the purpose of administering its assets. If there is only one surviving officer, he, of course, is sole trustee for these purposes.

II. There can be no question that the corporation was dissolved at the time this proceeding was instituted. The petition states expressly that the corporation was dissolved on the 1st of October, 1861, and the question of such dissolution is completely covered by the confession made by the demurrer. (*Mumma v. The Potomac Company*, 8 Pet. 281.) The manner of the dissolution is utterly immaterial while the fact of dissolution stands confessed.

III. It is unnecessary and supererogatory that the petition should have stated any other facts bearing on this point. But it does state other facts. It expressly avers that the charter of the Cairo & Fulton Railroad Company was repealed. The fact of repeal therefore stands admitted, and cannot be questioned in the posture in which this case stands before this court. Of course the dissolution of the corporation is the inevitable consequence. The petition further states that the State of Missouri seized and took possession of the franchises of the company, and all its rolling stock and other property, and on the 1st of October, 1861, sold the same. Such seizure worked a dissolution. A corporation may be dissolved by a surrender of all its corporate rights, and may do and suffer to be done acts equivalent to a direct surrender; and if a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its corporate rights — that is, it is dissolved. (*Slee v. Bloom*, 19 Johns. 456.)

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IV. When the State becomes the purchaser of such railroad under the lien reserved, both the lien and the former company are extinguished, and the indebtedness is extinguished with the company. (Advisory constitutional opinion, 37 Mo. 129.)

Louis Houck, for defendant in error.

I. The bill shows no equity. Courts of equity will not consider a corporation dissolved until the fact of a dissolution has been first ascertained by a proceeding in *quo warranto* or by *scire facias*. No such proceeding has taken place in the case at bar. How, then, can a court of equity consider the corporation dissolved? (President, etc., v. Trenton Bridge Co., 2 Beach, 46; State v. Merch. Ins. & Trust Co., 8 N. H. 235; Society, etc., v. Morris Canal, etc., Saxton, 157; Att'y-Gen. v. Stevens, *id.* 369; Am. Law Reg., N. S., 586, and cases cited; see also Abb. Dig. 338 *et seq.*, tit. Forfeiture; Att'y-Gen. v. Utica Ins. Co., 2 Johns. Ch. 371-7; Ang. & Ames on Corp. 734.)

II. A cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. (Ang. & Ames on Corp. 777; Abb. Dig. 339, § 12.)

III. But it is claimed that by the "sell-out act" the Cairo & Fulton Railroad Company was dissolved. No such provision is contained in that act. The ninth section provides that "the companies purchasing any of the above-named railroads shall have all the rights, franchises, privileges and immunities which were had and enjoyed by the companies for whose default said roads were sold, under the charter and the laws amendatory thereof." This certainly cannot be construed as dissolving the Cairo & Fulton Railroad Company. No attempt is made to repeal the charter of the company. The charter is not declared forfeited. The mere fact that the railroad of the Cairo & Fulton Railroad Company was seized does not dissolve the company, because a railroad corporation may exist although it have no railway. (State v. Rives, 5 Ired., N. C., 309; Com. v. Tenth Mass. Turnp. Corp., 5 Cush. 509; Bruffet v. Great Western R.R. Co., 35—VOL. XLVIII.

25 Ill. 353.) Nor can it be said that the Cairo & Fulton Railroad Company of Missouri is dissolved because the franchises possessed by the company are vested in the purchasers of the road. The Legislature was not competent to vest in the purchasers the franchises of the said company, for this would be special legislation. (*Atkinson v. C. & M. R.R. Co.*, 15 Ohio St. 35; see *Sess. Acts 1865-6*, p. 112, § 9.)

IV. Again, if the "sell-out act" dissolved the Cairo & Fulton Railroad Company of Missouri, by the act of 1868 (*Sess. Acts 1868*, p. 92) provision is made how the affairs of the Cairo & Fulton Railroad Company of Missouri shall be settled up. The mode pointed out by the Legislature should be pursued.

V. It is true the Cairo & Fulton Railroad was subject to the provision of the general corporation law providing that all charters shall be subject to alteration and repeal. But the charter of the company has in no way been directly repealed.

CURRIER, Judge, delivered the opinion of the court.

This action was commenced by the plaintiffs, as creditors of the Cairo & Fulton Railroad Company, against the defendant, as the sole remaining officer of the company competent to act as a trustee under the statute in relation to dissolved corporations. (*Gen. Stat. 1865*, p. 329, § 19; *R. C. 1855*, p. 375, § 19.) The petition is demurred to, and the questions presented for consideration arise upon the action of the court in sustaining the demurrer. It is conceded that this proceeding cannot be sustained unless it is shown that the corporation was dissolved at the time the suit was instituted. As showing such dissolution it is averred in the petition as follows:

"The plaintiffs further relate that by an act of the Legislature of the State of Missouri, approved February 19, 1866, entitled 'An act to provide for the sale of certain railroads and property by the governor, to foreclose the State's lien thereon, and to secure the early completion of the Southwest Branch Pacific, the Platte Country, the St. Louis & Iron Mountain, and the Cairo & Fulton railroads of Missouri,' the charter of said corporation was repealed, and the government of the State of Missouri, by

which the same was granted, reclaimed, seized and took possession of the franchises of said corporation, and together with the road, rolling stock and other property of said corporation, on the 1st day of October, 1866, sold said franchises, whereby said corporation, on the day and year aforesaid, became and is dissolved."

The repeal of the charter and the dissolution of the corporation are here distinctly averred. If these averments are to be regarded as allegations of facts, and not merely as legal conclusions from the facts previously stated, then the dissolution of the corporation stands admitted by the pleadings, for the demurrer admits all material facts that are properly set forth in the petition. (See *Mumma v. Potomac Company*, 8 Pet. 281.) The petition, however, states the following additional facts: "That said corporation failed to complete its railroad; that the same is in an unfinished condition and abandoned; that the same has become dilapidated and gone to waste, and that the corporation has not kept up or maintained its corporate existence, or had or held a legal election for officers thereof since the election held in 1861;" and that the present defendant is the only surviving of the officers of said dissolved corporation qualified under the constitution and laws of this State to act as a trustee of the property thereof. The petition thus shows that the corporation had held no election for the choice of officers for the nine years preceding the filing of the petition herein; that only one of the officers elected in 1861 was in a position to act as trustee under the statute; that the road had gone to decay and been abandoned; that the State had foreclosed its lien and sold out the road and rolling stock and other property of the corporation, as also its corporate rights and franchises. Was the corporation thereby, within the meaning of the statute, dissolved? In *Slee v. Bloom*, 19 Johns. 456, it was determined that a corporation might be dissolved by a surrender of its franchises, and that if a corporation suffered acts to be done which had the effect to destroy the end and object for which it was created, it was equivalent to a surrender of its rights. Now the petition in the case before us shows clearly that the corporation in question had suffered acts

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to be done which destroyed the end and purpose for which the charter was originally granted. It had itself abandoned these ends and objects, for it is alleged in the petition that the corporation was created for the sole purpose of constructing and operating the railroad; and that purpose, as the petitioner shows, was given up and abandoned. Spencer, C. J., in delivering the opinion of the court in *Slee v. Bloom*, says: "The argument is that, being incorporated for twenty years, there exists a corporate capacity for that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The Legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period *volens volens*. It was implied that during that period they should do nothing to forfeit their rights, nor surrender them back, nor do any act tantamount thereto. * * *

I doubt extremely whether the capacity to resume the functions of the corporation does not in fact exist, but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out without any practical reference to the cause, as a stumbling-block to the attainment of justice between the parties."

This court, in its advisory opinion, reported in 37 Mo. 134, referring to the sale of railroads under the State lien, holds this language: "When the State becomes the purchaser of such railroad under the lien reserved, both the lien and the former company are extinguished." According to this view the seizure and sale under the State lien extinguished the Cairo & Fulton Railroad Company, such seizure and sale destroying the objects for which the corporation was instituted. Upon the whole we are disposed to hold, in accordance with the decision in *Slee v. Bloom*, that the facts alleged in the petition sufficiently showed a dissolution of the corporation by a practical surrender and abandonment of its corporate rights and franchises. The further point is made that there is a defect of parties defendant. As previously suggested, the petition avers and the demurrer admits that the defendant is the only surviving officer of the corporation competent to act as a trustee under the statute. This fact standing

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admitted by the pleading, disposes of the question in regard to the proper persons being joined as parties defendant.

The view we have taken involves a reversal of the judgment, and it will accordingly be reversed and the cause remanded. The other judges concur.

PRISCILLA JOHNSON *et al.*, Appellants, v. EDWIN W. PARCELS,
Respondent.

1. *U. S. land warrants — U. S. land patents — Patentee dead at time of issue, patent relates back to date of enlistment — Dower.*— Where a land warrant issued from the United States to a soldier for services in the war of 1812, and the patent therefor was made out in his name but after his death, under the acts of Congress (5 U. S. Stat. at Large, 31, 497), the patent will relate back to the date of his enlistment; he will be held to have died seized of the land, and his widow will be entitled to her dower therein.
2. *Military bounty warrants are real estate.*— Military bounty land warrants have always been considered real estate, and go, upon the death of the holder, to the heirs at law, and not to the executors or administrators.

Appeal from Adair Circuit Court.

Ellison & Ellison, and *Harrington & Cover*, for appellants.

I. A United States land warrant is real estate and descends to heirs. (*Reader et al. v. Barr et al.*, 5 Ohio, 458; *Brush v. Ware*, 15 Pet. 93; 3 Opinions of At.-Gen. 382; Public Lands, Laws and Instructions, 63-5, 176, 184.) If the warrant is real estate the defendant has dower in it.

II. Henry Calvin Skinner gets the land by descent and not by purchase. (*Hackler's Heirs v. Cabel, Walker, Miss.*, 91; *Lessee of Bond v. Swearingen*, 1 Ohio, 182; *Douglas v. McCoy*, 5 Ohio, 526; *Schedda v. Sawyer*, 4 McLean, 181.)

III. The patent issuing after the death of Uriah W. Skinner is not void. (5 U. S. Stat. at Large, 31.) But such patent is only evidence of already existing title. (*Hackler's Heirs v. Cabel, supra.*)

IV. And such patent relates back to the act of Congress

granting the land, or at least to the termination of Uriah W. Skinner's services as a soldier in the war of 1812. (Hackler's Heirs v. Cabel, *supra*; 2 Washb. Real Prop. 619.)

V. Uriah W. Skinner was seized of the land in fact by relation during his life, by virtue of the act of Congress of May 20, 1830. (5 U. S. Stat. at Large, 31; Jackson v. Winslow, 2 Johns. 80; Jackson v. How, 14 Johns. 405; 2 Hill, 303; Crowley v. Wallace, 12 Mo. 143; Landes v. Brandt, 10 How. 348, 373; Barr v. Gratz, 4 Wheat. 213; Cavender v. Smith, 5 Clarke, Iowa, 157; 3 Green, Iowa, 349; Rogers v. Brent, 5 Gilm. 573; Frost v. Beekman, 1 Johns. Ch. 297; Butler & Baker's case, 3 Rep. 35.)

Barrows & De France, and Willan & Gilstrap, for respondent.

Calvin Skinner procured the lands by purchase and not by descent. Uriah died without locating the land under the warrant. Under the act of Congress (5 U. S. Stat. at Large, 497) "the heirs or legal representatives" of the soldier are merely those who are next entitled to the benefit of the grant in their own right under the law; not derivable from the warrant which may have been issued and had become inoperative. The act was not designed to create a law of descent of title not yet attached to land. (See § 2.)

The act under which the certificate of reissue was granted is an independent act, not a continuation of the act under which the original warrant was issued, and operated as a new grant to the heirs of deceased soldiers embraced in its provisions; and the same right to locate 160 acres which Uriah would have in his life, was vested by law in his next of kin in his own right.

Uriah W. Skinner had no such seizin in the land as to entitle his widow to maintain suit for dower. (1 Scribn. Dower, 251 *et seq.*; Co. Litt. 31 *a*, 37 *a*; *id.* 468, 681; Park. Dower, 304, 370; Bac. Abr., tit. Dower, 75; Sir W. Jones, 361; 2 Blackst. Com. 131; 4 Kent, 37; Miller v. Wilson, 15 Ohio, 108; Rands v. Kendall, 15 Ohio, 671; Firestone v. Firestone, 2 Ohio St. 415; 1 Washb. Real Prop. 179, 181; Burris v. Page, 12 Mo.

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358 ; 3 Bac. Abr. 208 ; 7 Mass. 253 ; 23 Pick. 84 ; Wagn. Stat. 538 ; Wells v. Moore, 16 Mo. 478 ; see also Collins v. Brannin, 1 Mo. 540 ; Thomas v. Wyatt, 25 Mo. 24.) The act of Congress of May, 1836, does not conflict with this doctrine. See also 31 Mo. 188, and cases cited.

The doctrine of relation does not aid appellants. There was no estate *in esse* to which it could apply. Uriah Skinner had simply a privilege of locating 160 acres of land somewhere within a certain time, but failed to locate it. His widow could have no interest in the land, for immediately on his death, his rights by reason of his services, survived and vested absolutely in his descendants in their own rights.

WAGNER, Judge, delivered the opinion of the court.

From the record in this case it appears that one Uriah W. Skinner was a soldier in the service of the United States, in the Thirty-fifth regiment of infantry, in the war of 1812, and as such was, under the acts of Congress, entitled to 160 acres of land ; that afterward, on the 27th day of March, 1829, a land warrant was issued to him, and in April of the same year he was married to the plaintiff, Priscilla, and they lived together until 1834, at which time he died, and she has since married Henry Johnson, who is made a plaintiff herein.

On the 11th day of January, 1847, the warrant was located on a tract of land in Adair county, under an act of Congress approved July 27, 1842, and on March 5, 1847, a patent was issued in the name of said Uriah W. Of the marriage the only issue born was Henry Calvin Skinner, who survived his father, and McNair was appointed his curator, and under certain proceedings sold his interest in the above described land to one Good, who conveyed to Parcels, defendant. The plaintiff instituted this suit for the purpose of obtaining dower in the premises, and the court below decided that she was not entitled to recover. The only question, therefore, is whether Uriah W. in his lifetime had such a seizin or estate as authorized her to be endowed. It was said in the argument that she had received a third of the proceeds of the

sale of the land, but the record fails to show any such fact, and she positively denies it.

The acts of Congress whence the title to the land emanated, provided for giving, among other bounties, to soldiers who should enlist, 160 acres of land, to be designated, surveyed and laid off at the public expense, in such manner and upon such terms and conditions as might be provided by law. (2 U. S. Stat. at Large, 669, 672.) Congress first prescribed that the land above designated should be located within certain defined limits and within a restricted period. But the limit was extended from time to time, and applied to other lands, till finally, by act approved July 27, 1842 (5 U. S. Stat. at Large, 497), it was enacted that in all cases for bounty lands for military services in the war of 1812, with Great Britain, which remained unsatisfied at the date of that act, it should be lawful for the person in whose name the warrant was issued, his heirs or legal representatives, to enter at the proper land office, in any of the States or territories in which the same might lie, the quantity of public lands subject to private entry to which the said person should be entitled in virtue of such warrant, in quarter-sections.

The act also allowed further time to complete the issuing and locating of military land warrants by continuing in force certain prior acts on the same subject, and provided that the certificate of location should not be assignable, but the patent should in all cases issue in the name of the person originally entitled to the bounty land, or to his heirs or legal representatives. Another act on the subject declares that "in all cases where patents for public lands have been issued or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life." (5 U. S. Stat. at Large, 31.)

It is insisted for the defendant that Henry Calvin Skinner, the heir, took as a purchaser, and that, therefore, no right of dower could attach in the plaintiff. But it is difficult to base this claim

on any substantial ground. The patent issued by authority of the act of Congress, and the act of Congress was founded on a consideration directly moving from Uriah W. Skinner, the patentee and ancestor. It directly said to him, if you will enlist and perform certain military services, the government will give you as a bounty 160 acres of land. He accepted the proposition, executed his part of the contract, and the land warrant was accordingly issued to him. Henry Calvin gave no consideration, entered into no contract of purchase, and simply acquired title because he was heir. All the title that he possessed he derived from his ancestor.

This question has several times passed through judicial review in the tribunals of the country, and in all instances, so far as I have been able to learn, the courts have held that the heir takes this character of title by descent and not by purchase. (*Hackler v. Cabel, Walker, Miss.*, 91; *Bond's Lessee v. Swearingen*, 1 Ohio, 182.)

The language of the act of Congress, it seems to me, is plain, and clearly expresses the intention had in view by the law-makers. It is that when, in pursuance of law, a patent has issued or may issue to a person who has died before the issuance of the patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life. This clearly shows that a descent of the premises was contemplated. Had the person lived and the patent been issued to him during his lifetime, the act would have been useless; for the land would have descended to the heir, devisee or assignee in the very manner directed. But, being dead, the law relates the title back to the time when he was living, and, for all the purposes of descent and distribution, invests him with title.

Military bounty land warrants have always been considered as real estate, and go, upon the death of the holder, to the heirs at law, and not to the executors and administrators. Such has been the uniform view held and practiced by the general government. (3 Op. At.-Gen. 382.)

In the case of *Wells v. Moore*, 16 Mo. 478, it was held that

under the act of Congress of March 3, 1843, a widow was not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. The act of March 3, 1843, under which the decision was made, enacted that "in any case where a party entitled to claim the benefits of any of the pre-emption laws, shall have died before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of such party, or one of the heirs, to file the necessary papers to complete the same, provided that the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor; and a patent thereon shall cause the title to inure to the said heirs, as if their names had been specially mentioned."

When the pre-emptor dies, the law makes the original grant to the heirs. A pre-emption interest in lands is not an estate of inheritance. The pre-emptor's right is merely to purchase at a fixed price within a limited time, to the exclusion of others. He may be unable or unwilling to purchase at the price or by the time mentioned in the law, and the land may then be sold to others. These conditions annexed to his possession show clearly that he is not invested with an inheritable estate. Again, where the papers have not been filed by the pre-emptor in his lifetime, the executor or administrator, or the heir, is clothed with the duty of completing the same, and there is no recognition of the widow's right to dower. It is obvious that no part of her dower interest in the estate of her husband could be taken to pay the purchase of the pre-emption claim, and it would therefore have to be paid out of the balance of the estate.

The two cases are wholly unlike and present no similarity whatever. In the case at bar the heir takes a descendible estate, as if there was a seizin in fact on the part of the ancestor; in the other case, when certain acts are performed by the executor or administrator or heir, there is an original grant to the heir.

There is another principle which is invoked in this case, and that is the doctrine of relation. Mr. Cruise, in his work on Real Property, says: "There is no rule better founded in law, reason

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and convenience than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

In *Magwire v. Tyler*, 40 Mo. 406, we held that patents issued by the United States government relate back to the first or inceptive act in the series of concurrent acts which are necessary under the law to complete the conveyance.

In *Landes v. Brandt*, 10 How. 348, the title in question was an imperfect one in the original claimant under the Spanish government, and the creditor of the one holding this title seized and sold it on execution, and subsequent to this the United States confirmed the title to the original claimant. It was held by relation that he was the real owner when the sale was made, and consequently the purchaser at the sheriff's sale held the land against the devisee of the original claimant. The same doctrine is announced in *Barr v. Gratz*, 4 Wheat. 213.

But courts will not apply the doctrine of relation when, by so doing, they will work injustice to the rights of innocent parties, acquired between the events which it is proposed thus to unite by relation, nor by making that tortious which was lawful originally.

A deed made in pursuance of a previous contract to sell, may, as between the parties to the same, relate back to the date of the contract; but it will not be allowed to do so to the injury of intermediate innocent purchasers, or strangers who have acquired an interest. (3 Washb. Real Prop. 277; *Frost v. Beekman*, 1 Johns. Ch. 297; *Vancourt v. Moore*, 26 Mo. 92.)

Now if we apply the doctrine laid down by *Cruise*, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation, we find that the enlistment into the military service by *Uriah W. Skinner*, and the promise by the government to give him 160 acres of land, were the substantial parts. In the language of this court, they constitute the first or inceptive acts, and the patent must relate back to them, according to the rule laid down in *Magwire v. Tyler* and *Landes v. Brandt*.

No question of innocent purchase can arise in this case, for the record shows that *Good* purchased the premises as the land of

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Henry Calvin Skinner, and this deed was regularly recorded long before the land was conveyed to Parcels. Parcels, then, purchased with full knowledge; and if he was negligent in inquiring into Skinner's title, any loss he may suffer he must attribute to his own want of watchfulness and care.

The result is that the plaintiff is entitled to dower in the land mentioned in the petition, and the judgment must therefore be reversed and the cause remanded. The other judges concur.

JOHN E. COWEN, Respondent, v. THE ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, Appellant.

1. *Practice, civil* — *Motion for new trial, assignment of objections in.* — The Supreme Court will not consider objections to the action of the lower court which were not assigned in motion for new trial.

Appeal from Jefferson Circuit Court.

Dryden & Dryden, for appellant.

Pipkin, for respondent.

WAGNER, Judge, delivered the opinion of the court.

None of the objections urged for a reversal of the judgment in this case were brought to the attention of the court below in a motion for a new trial. No opportunity was allowed for the court to correct its errors, if any it committed. The points now made are that the court erred in admitting a deposition to be read in evidence, and also in giving instructions. The only reasons assigned in the motion for a new trial are that the verdict is contrary to the law and the evidence, and that the same was for the plaintiff when it should have been for the defendant. The questions raised here were not submitted to the Circuit Court.

Judgment affirmed. The other judges concur.

The State of Missouri v. Griggs.—Zahnd v. Darling.

THE STATE OF MISSOURI, Respondent, v. HILLIARD GRIGGS,
Appellant.

1. *Practice, Supreme Court — Error — Appeal.*—A case showing no writ of error or appeal will be dismissed.

Appeal from Scott Circuit Court.

A. J. Baker, Attorney-General, for respondent.

L. Brown, for appellant.

WAGNER, Judge, delivered the opinion of the court.

In this case there is no writ of error, but it purports to come here by appeal. The record does not show that any appeal was ever granted or allowed in the court below.

The case will therefore be dismissed; the other judges concurring.

JOHN ZAHND, Appellant, v. SIMON DARLING, Respondent.

1. *Practice, civil — Judgment for costs not final.*—A judgment for costs only will not support an appeal.
2. *Practice, civil — Appeal — Objections — Exceptions.*—Objections not saved by exceptions will not be examined on appeal.

Appeal from Scotland Circuit Court.

Durkee & Pratt, for appellant.

Cramer & Peters, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This cause was tried by a jury and they returned a verdict for the defendant. Upon the verdict the court gave judgment for costs only. There is no final judgment to support an appeal. The only complaint made by the appellant is that the court erred in admitting certain testimony. We have looked into the transcript, and find that no exceptions were taken or saved to the action of the court.

Let the appeal be dismissed. The other judges concur.

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WILLIAM WIER, Plaintiff in Error, v. THE ST. LOUIS & IRON
MOUNTAIN RAILROAD COMPANY, Defendant in Error.

1. *Damages — Railroad companies — Accident in towns — Public highway.* — Notwithstanding the provisions of article v of the act touching damages (Wagn. Stat. 520), the law will not presume the negligence of a railroad company from the killing of stock within the corporate limits of a town or city, especially when the accident happened at a crossing long used as a public highway. (See Wagn. Stat. ch. 37, art. II, § 48.)

Error to Iron Circuit Court.

John L. Thomas, for plaintiff in error, contended that the cases of Iba v. Hann. & St. Jo. R.R. Co., 45 Mo. 469; Meyer v. North Mo. R.R. Co., 35 Mo. 352, and Van Decker v. Rensselaer & Saratoga R.R. Co., 13 Barb. 390, did not adjudicate the case at bar, and that on principle there was more necessity for fencing railroad tracks in towns and cities, and particularly about depots and switches, the neighborhood where the accident occurred.

Dryden & Dryden, for defendant in error.

The cases already decided by this court clearly relieve the defendant from the imputation of implied negligence for not having fenced. (Meyer v. North Mo. R.R. Co., 35 Mo. 352; Iba v. Hann. & St. Jo. R.R. Co., 45 Mo. 469; Indianapolis & Central R.R. Co. v. Kenney, 8 Ind. 402; Lafayette & Indiana R.R. Co. v. Shriver, 6 Ind. 141; Indianapolis & Central R.R. Co. v. Oestel, 20 Ind. 231.)

CURRIER, Judge, delivered the opinion of the court.

This suit was brought to recover the value of a horse killed upon the defendant's railroad within the corporate limits of the town of De Soto, a town which, as the agreed statement shows, was duly laid off into streets and avenues, blocks and lots. It is admitted, moreover, that the ground over which the defendants have a right of way for the purposes of their railroad in the town of De Soto, at the point where the accident complained of occurred, is, and for the past twelve years has been, used by the

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public as a "public highway." Were the defendants under legal obligations to fence up this way and exclude the public from its accustomed use of it?

They were not required to do so under the provisions of section 48, article II, chapter 37, Wagner's Statutes; since that section requires railroad companies to fence their tracks only where these tracks "pass through, along or adjoining inclosed or cultivated fields, or uninclosed prairie lands;" and the locality in question is admitted not to come within either of these designations.

Under section 5 of the damage act (Wagn. Stat. 520), however, according to the general phraseology of the section, negligence on the part of a railroad company is imputed, as a matter of law, where an animal is injured or killed by the company's cars, engines, etc., at any point on the road where the track is not fenced, except at the crossings of public highways. The prior decisions of this court nevertheless seem to exclude the idea that the inference of negligence, in the absence of proof, arises where animals are injured upon a railroad track within the limits of incorporated towns and cities, although the track may not be fenced, and although the injury may not occur at an actual crossing. Thus, in *Meyers v. The North Missouri R.R. Co.*, 35 Mo. 352, it was decided that the defendant in that case was not liable, in the absence of proof showing negligence, where an animal had been killed upon the track of the road at a point where the track crossed a strip of ground dedicated to public use as a street or highway, although no such use had ever been made of the ground, and although the ground was not in a condition to admit of that use. In *Iba v. The Hannibal & St. Joseph R.R. Co.*, 45 Mo. 473, it is said, in the opinion of the court, that the lower court was "clearly right in holding that the obligation to fence could not extend to the track within towns and cities."

If there is no obligation to fence within such limits, then the absence of a lawful fence within the limits indicated can be no ground on which to base the inference of negligence in law.

In the case before us it not only stands admitted that the accident occurred within the limits of an incorporated town, which was duly laid out and divided into parts by streets, blocks and

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lots, but also that the locality of the accident had been in long use as a public way. It is further conceded by the agreed statement that no negligence was imputable to the defendant, "except that implied by law from the fact that said road was not fenced."

As just remarked, if the company was not under legal obligations to fence at the designated point—it being within the limits of an incorporated town—no inference of negligence can arise from the absence of the fence. But the locality of the accident was not only within the limits of an incorporated town duly laid off into streets, etc.; it was at a place where the adjacent grounds were and for a long time had been in actual use, as the agreed case shows, as public grounds or a public highway.

This circumstance, as it seems to us, brings the case fully within the spirit and intent of the exception contained in article v of the damage act, relating to highway crossings.

In this view the judgment of the court below was right and will be affirmed. The other judges concur.

ELI ERVIN, Defendant in Error, v. TERRENCE BRADY AND LUCINDA BRADY, Plaintiffs in Error.

1. *Judgment, former, when bar to suit.*—An action to have defendant's dower in certain lands admeasured will be barred by a former judgment between plaintiff's grantor and defendant, based on a proceeding to have dower assigned in the same land.
2. *Practice, civil—Judgment, finding of facts in.*—A court sitting as a jury is not bound to incorporate in its judgment a finding upon every fact which may arise in the cause.

Error to Cape Girardeau Circuit Court.

L. Brown, for plaintiffs in error.

I. It does not appear that the former judgment pleaded in this cause was a decision on the merits. Hence it was no bar. (*Ridgely v. Stillwell*, 27 Mo. 128; *Taylor v. Larkin*, 12 Mo. 103; *Bell v. Hoagland*, 15 Mo. 860.)

II. Where a cause is submitted without a jury, judgment must show that all the issues have been passed upon (*Russell v. Bar-*

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croft, 1 Mo. 514; Marmaduke v. McMasters, 24 Mo. 51), and cover all the issues made by the pleadings; otherwise it is insufficient (Downing v. Bourlier, 21 Mo. 149), and warrant the conclusions of law and judgment rendered thereon. (Pearce v. Burnes, 22 Mo. 577; Pearce v. Roberts, 22 Mo. 582; State v. Ruggles, 23 Mo. 339.)

G. H. Green and *L. Houck*, for defendant in error.

No finding of the facts by the Circuit Court was necessary. (Judge v. Booge, 47 Mo. 545.)

WAGNER, Judge, delivered the opinion of the court.

This action was brought by the plaintiff to have dower in certain lands admeasured and set off to the defendant as the widow of her former husband, one Masterson, deceased. The plaintiff claimed an interest in the premises by purchase from some of the heirs. The defendant's answer contained two counts: the first set up an interest under the homestead law, and the second a former judgment between the plaintiff's grantor and the defendant, on a proceeding to have dower assigned in the same land.

The court found against the defendant on the first count, and in her favor on the second count, and held that the former judgment was an effectual bar, and thereon rendered judgment in her favor.

The counsel for the defendant then made a motion to amend the judgment so as to incorporate in it certain findings of fact. This the court overruled, and that constitutes the only error complained of.

We know of no law requiring the court to specifically state in the judgment every fact which may arise in the cause. The judgment was for the defendant, and is a complete bar to any further action by the plaintiff for the same cause, and we do not see that the defendant can reasonably ask for anything more.

Judgment affirmed. The other judges concur.

WILLIAM GRUMLEY, Respondent, v. WM. G. WEBB, Appellant.

PER CURIAM.

1. *Equity—Statute of frauds—Accord and satisfaction—Receipt—Action barred by*—A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds (Wagn. Stat. 655, § 2), is evidence of an accord and satisfaction; and, when coupled with the payment of money, would bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt.
2. *Equity—Statute of frauds—Part performance—Payment—Possession—Vendor cannot invoke the aid of equity, when.*—Even where a parol contract is in the nature of a purchase, and so embraced in the purview of the statute of frauds, if the purchase money is paid and the purchaser is in possession and holds a perfect record title, the vendor cannot invoke the active interposition of a court of equity to recover the property. Such a claim is inequitable and unconscionable, and has no equity which a court of equity will touch.
3. *Contract—Receipt embraces what matters—Construed, how*—A receipt given in satisfaction of a judgment and "all claims and demands" does not, on its face, include matters not embraced in the judgment. But the receipt must be interpreted and construed from existing facts and in the light of surrounding and cotemporary circumstances. (Grumley v. Webb, 44 Mo. 456.) And if the parties to the receipt clearly and manifestly intended to include in it other claims besides the judgment, courts will interpret the contract accordingly.

Per BLISS, Judge.

1. *Equity—Statute of frauds—Performance—What acts take case out of—Estoppel.*—An unexecuted agreement for the sale or surrender of an equity may not, under the statute of frauds (Wagn. Stat. 655, § 2), be enforced. But if the holder of an equitable claim receives money in payment for the same from one who has the legal title and the possession, gives him a receipt and discharge, and leaves him in quiet enjoyment of the property—does all all things, in short, which could be done in the settlement of his claim—he cannot afterward invoke the statute and say that his discharge was not in writing. His contract is executed. His equity is dead. And he is estopped by his own conduct from further urging his claim. In such case, the possession prior to the settlement having been adverse to the claimant, his subsequent acquiescence in it would have far greater significance than if possession were rightful or held under claimant.

Per WAGNER, Judge, dissenting.

1. *Agency—Power of attorney to compromise suit for client.*—An attorney employed in the usual way to conduct a suit has, in general, no authority to enter into a compromise without the sanction, express or implied, of his client.

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2. *Practice, civil — Supreme Court — Res adjudicata.*— When a case has been decided by this court, and again comes here by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata* and no longer open to dispute.
3. *Equity — Statute of frauds — Divestiture of equitable title must be in writing.*— A voluntary divestiture of an equitable estate by the owner, for a valuable consideration, is in the nature of a conveyance of his title by bargain and sale, and under the statute of frauds (Wagn. Stat. 655, § 2) cannot be proved by parol testimony. This proposition of law is sustained by the decision in *Hughes v. Moore*, 7 Cranch, 176. The case at bar is not one executed by possession and turning on part performance.
4. *Equity — Statute of frauds — Release proved, how.*— A release is not by act or operation of law, but by the act of the party releasing; and therefore the act can be proved only by a deed or conveyance in writing.
5. *Equity — Legal and equitable transfers.*— No difference in principle can exist between the transfer of a legal and that of an equitable estate.

Appeal from St. Louis Circuit Court.

Geo. P. Strong, for appellant.

The cause of action in this case originated prior to the date of the discharge. All the facts upon which this suit is based were well known to Grumley when he made the settlement. The receipt, when interpreted in the light of all the facts and circumstances connected with the settlement, is a full discharge of the plaintiff's claims embraced in this suit. (Altham's case, 4 Coke, 305-6; *Vedder v. Vedder*, 1 Denio, 259; *Hoes v. Van Hosen*, 1 Barb. Ch. 398; *Van Brunt v. Van Brunt*, 3 Edw. Ch., N. Y., 16; 1 Show. 150, 154; *Bell v. Bruen*, 1 How. 169; *Russell v. Rogers*, 10 Wend. 479; *Perkins v. Forniquet*, 14 How. 313; *Gray v. McCune*, 23 Penn. 447; *McGlynn v. Billings*, 16 Verm. 329.)

The two suits virtually embraced the whole matter in controversy.

Grumley had his election to take the lease, with the rents and profits, or to take the value of the buildings. He could not have both. If Webb paid for the buildings, the rents and profits would belong to him. Grumley could not be forced to take the lease, nor ought he to be allowed to evade the effect of the settlement by alleging that he did not know that he could recover the

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lease. He knew that Webb had it, and he knew all the circumstances under which it was obtained. With all this knowledge, he made no claim to the lease for more than four years, and brought suit for the value of the buildings. When that suit was settled and dismissed, all claim to that lease was relinquished. Grumley's delay in asserting any claim, especially after he knew the \$7,000 suit was dismissed, and that Webb claimed there had been a full settlement, was a recognition of the fact of the settlement and a waiver of any of his rights. (See *McNew v. Booth*, 42 Mo. 193, as to what would be a reasonable time in which to assert a claim.)

The receipt should be so interpreted as to give effect, if possible, to all its terms. It should be held to apply to all claims of the same nature as those embraced in the judgment specified. General words are only rejected, or limited to the special recital, when the testimony shows that the parties could not be presumed to have had in mind the subject to which it is sought to apply them. In all other cases they should be allowed their natural and reasonable force. (*Ramsdell v. Hylton*, 2 Ves. Sr. 310; *Van Brunt v. Van Brunt*, *supra*; *Moore v. McGrath*, Cowp. 9, 11; *Knight v. Cole*, *supra*; *Bell v. Bruen*, *supra*; *Haydell v. Roussell*, 1 La. Ann. 38; 6 Bac. Abr. 632.)

The settlement was a full, fair and reasonable settlement. Defendant has paid for Grumley, as the accounts show, \$11,593.75 profits on his own money, for a lease that was not worth over \$6,000. Such a payment ought to be held to include all matters, all demands growing out of that property, up to March 7, 1865.

The receipt is a sufficient compliance with the statute of frauds. A release of a claim or demand is a release or settlement and extinguishment of all right to the thing out of which the demand arose. (4 Com. Dig. 96, §§ 20, 22, 24-5; *Hughes v. Moore*, 7 Cranch, 176; *Perkins v. Forniquet*, 14 How. 310; *Altham's case*, 4 Coke, 304-6; *Dearborn v. Cross*, 2 Cow. 48.) The plaintiff has received a large sum of money from defendant, who had reason to believe that he was paying for a full discharge of all claims and demands; he was led to that belief by the plaintiff.

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Grumley repeatedly sent him (defendant) to Broadhead to settle without any limitation of authority. Broadhead did act as his agent, and did settle both suits. There was nothing to lead defendant to doubt his full authority, and plaintiff ought not now to be allowed to deny it. If Broadhead had no authority, and yet settled the second suit, and received from Webb, acting in good faith, a large sum of money in consideration of that settlement; and if Grumley, by his words or conduct, induced Webb to believe that Broadhead had authority, Grumley is estopped to deny that authority. (*Merchants' National Bank v. State National Bank of Boston*, 10 Wall. 604; *Hern v. Nichols*, 1 Salk. 289; *Farmers' Bank v. B. & D. Bank*, 16 N. Y. 131, 133, 136; *Welland Canal v. Hathaway*, 8 Wend. 483.) In the case of the *Merchants' Bank*, the court say: "Smith, by his conduct, if not by his declarations, avows his authority to buy the certificates and gold in question; and the bank, under the circumstances, had a right to believe him." So with Col. Broadhead. He, by his conduct, avowed his authority to settle both suits, and under the circumstances Webb had a right to believe him.

All that is required by the statute of frauds is some memorandum in writing signed by the party to be charged or affected. The release or receipt is such a memorandum. Webb does not claim under Grumley but under O'Fallon. He has a title good against all the world except Grumley, who has a claim or demand to it; but Webb is in possession, and Grumley is desirous to assert this claim or demand. Now, when he releases that, he releases everything that he has—every right. How, then, can this court enforce a claim or demand which he has discharged?

When Webb settled for this claim and demand, he settled everything that Grumley could enforce, and secured "repose and quiet" from the only party who could disturb the title he holds from O'Fallon.

The language of the receipt is not only broad enough to cover this claim, but its language implies that there is a claim embraced in it against Webb alone, as well as a joint claim against Bigham & Webb. The judgment was a joint one. This claim is against Webb alone, and the receipt refers to such a claim.

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N. Myers, with *Geo. W. Cline*, for respondent.

I. Although Webb procured the lease in controversy in his own name, yet the equitable title is in Grumley. (44 Mo. 444.)

II. The plaintiff, Grumley, has never in any way parted with his equitable interest in this new lease:

1st. Because he could part with it in the way of a voluntary transfer by a writing alone, in conformity to the requirements of the statute of frauds (Wagn. Stat. 655, § 2).

(a) Grumley's estate in the new lease is created "by operation of law:" it is sought to divest him of it, not in the same way, but by voluntary conveyance, in the way of bargain and sale. In all cases of voluntary conveyance of an "interest" in land, whether legal or equitable, parol testimony is inadmissible.

(b) This is not the case of rebutting, but of divesting an equity. It is not attempted to show that the equitable estate never did vest; but that after it had been vested a year and a half, the owner thereof voluntarily sold and parted with it. The defendant does not attempt to show by the receipt of March 7, 1865, that the equitable estate never vested in Grumley; but that, having vested more than a year previous, he, in the way of bargain and sale, parted with it.

A written memorandum in full conformity to the provisions and requirements of the statute of frauds is necessary. An equitable interest is as much within the statute of frauds as a legal interest. (Hughes v. Moore, 7 Cranch, 466; Millard v. Hathaway, 27 Cal. 119; Gratz v. Gratz, 4 Rawle, 434; Kelly *et al.* v. Stanberry, 13 Ohio, 426; Goucher v. Martin, 9 Watts, 107; Cravener v. Bowser, 4 Penn. St. 261; Simms v. Killian, 12 Ired. 252; Richards v. Richards, 9 Gray, 313; Bowser v. Cravener, 56 Penn. 132.)

2d. The defendant has no writing sufficient under the statute of frauds:

(a) Because there must be a designation of the land sold in the receipt, or in some writing to which the receipt refers. In the case at bar there is not the remotest or faintest reference to any interest in any land. The writing must show the whole contract,

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without reference to parol proof. (Shied v. Stamps, 2 Sneed, 172; Pipkin v. Jones, 1 Hum. 325; Simmonds v. Catlin, 2 Caines, 61-66; Johnson v. Catlin, 2 Johns. 258; Bankman v. Kuykendall, 6 Blackf. 21; Bailey *et al.* v. Ogdens, 3 Johns. 419; Ellis v. Deadman's Heirs, 4 Bibb, 467.)

(b) Because the only writing the defendant has is a receipt for the judgment alone. The receipt itself includes nothing else. The sweeping clause "in full of all claims and demands" is to be restrained and limited by the previous special recital of the judgment. A general release is to be taken most strongly against the releasor; but where there is a special recital, and then general words follow, the general words are to be restrained and qualified by the special recital. (See opinion in Grumley v. Webb, 44 Mo. 444, and authorities cited.)

(c) This receipt, then, is not a memorandum conveying any title to any land. It is a mere receipt for the judgment of \$11,522.54. It is sought to introduce verbal evidence, not to explain but to extend this receipt; to show by parol, not what it does cover, but what it does not cover. The case therefore shows an undivested equity in the plaintiff.

3d. Even if the statute of frauds were in no way applicable to this case, yet the evidence in the case shows clearly that Grumley did not receive the \$6,500 for anything but the judgment of \$11,522.54, the matter specially mentioned in the receipt; that it was not intended to include his right to the ten-year lease in controversy.

(a) Upon this branch of the case we submit there is no longer any question properly debatable in this court. Our review of the evidence shows that it is substantially the same as it was on the first trial. There is the same irreconcilable conflict. If, therefore, the case presents substantially the same aspect as it did when here before, it is no longer fairly open for debate. Perhaps it is admissible to ask the court to consider a new case, but it is certainly rather late to ask the court to reconsider an old one.

(b) But granting, for the argument, that the question is still open for debate here, we contend that (as justly remarked by the court in its original opinion) the conclusion is irresistible that the plaintiff in fact settled only for the judgment.

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III. The \$7,000 suit cuts no figure in this case. It sets up that Grumley had a right to remove the improvements before January, 1864, and sues Webb for damages for not allowing him to remove the buildings after the first of January, 1864. After the first of January, 1864, the buildings belonged to O'Fallon, the lessor of the ground. Even had Mr. Webb been foolish enough to pay anything for this, he would be simply paying for what the law would not compel him to pay. The settlement of a claim to which one is not entitled can by no means affect a claim to which he is entitled. Further, the "buildings" are not co-extensive with the lease; they are merely an incident of the lease, and if paid for, do at best entitle one to the ownership of a certain quantity of bricks, the difference between which and a leasehold interest it does not require a legal mind to discover. Again, an interest in land will not be divested by a mere agreement to dismiss a suit. At best there should be an agreement to relinquish the cause of action. This of itself effectually disposes of this matter. There should at least be a *retraxit*.

Moreover, if that \$7,000 suit had been of such a nature as that its settlement would defeat the plaintiff's present suit, then it would have to be so pleaded; and such a settlement would have to be in writing, as affecting, amounting to, and resulting in, a transfer of an interest in land. The writing, too, should have been signed by Grumley, or by some one authorized by him in writing. A moment's reflection shows this conclusively. Finally, the evidence, as reviewed above, shows that the \$7,000 suit was not included in the settlement. The settlement included nothing but the judgment of \$11,522.54. The evidence shows that Mr. Broadhead negotiated the settlement for Grumley, and had no authority to settle anything but the judgment. All Mr. Broadhead's acts outside of his express authority are void. (Holker v. Parker, 7 Cranch, 434, 460; Davidson v. Rozier, 23 Mo. 387; Wahrendorf v. Whittaker, 1 Mo. 205.)

CURRIER, Judge, delivered the opinion of the court.

The possession and legal title to the leasehold described in the petition is in the defendant, but the plaintiff claims to be the

equitable owner of it, and brings this suit to recover the rents and profits and to divest the defendant of title.

As an answer to the plaintiff's claim, the defendant avers a compromise and release of it. He sets up an accord and satisfaction in bar of the suit, alleging, in substance, that since the accrual of the cause of action sued on, the plaintiff and defendant have settled all matters in difference between them, including said supposed cause of action, and that the defendant, in consummation of such settlement, paid the plaintiff the sum of \$6,500, and that the plaintiff accepted and received the same in full satisfaction of all claims and demands then existing in his favor against the defendant—the claim now in litigation, as the defendant alleges, being one of them.

These allegations are put in issue by the pleadings. The case is thus made to turn upon the evidence adduced in proof of the alleged accord and satisfaction.

At the trial, the defendant, for the purpose of proving the averments of his answer, offered and read in evidence a receipt dated March 7, 1865, which was duly executed by the plaintiff. It appears from this receipt that the defendant, on the day the receipt was executed, paid to the plaintiff the sum of \$6,500, and that the plaintiff accepted and received the same as in full satisfaction of a certain judgment and "all claims and demands" then held by him against the defendant. So the receipt reads.

At first blush, the receipt seems to prove the defendant's case, since the cause of action sued on accrued prior to the execution of the receipt. That view, however, encounters objections. It is objected that the receipt fails to meet the requirements of the statute of frauds (Wagn. Stat 655, § 2); and further, that a true construction of its terms excludes the cause of action now in suit. It is proposed by construction to limit the effect of the receipt to the particular judgment therein set out and described.

The first objection is based upon the assumption that the plaintiff's equity constituted an interest in real estate that could not be sold or conveyed except by some instrument in writing which should meet the requirements of the statute of frauds in relation to such sales and conveyances.

It is then insisted that the receipt fails to meet these requirements. If that were so it would not invalidate the receipt as regards the use sought to be made of it here. It was not given in evidence to prove either a sale or conveyance, but to establish the fact of an accord and satisfaction which included and extinguished the plaintiff's equity. The plaintiff's objection as regards the point now under consideration is without force, unless it is shown that the plaintiff's interest in the leasehold was of such a nature that it could not be destroyed in the manner stated in the answer—that is, by an accord followed up and consummated in a complete satisfaction. The plaintiff's counsel cite and rely upon *Hughes v. Moore*, 7 Cranch, 466, as the strongest case to be found in the books in support of their position. But that case does not prove that the plaintiff's equity could not be extinguished by the accord and satisfaction evidenced by the receipt. It proves the direct opposite of that, as we shall presently see. In that case the equitable owner made a parol agreement, for a certain consideration agreed to be paid, to surrender and transfer his equitable interest in certain lands to the bargainees who held the legal title.

The agreement was not reduced to writing, nor was anything done in execution of it. The equitable owner nevertheless subsequently sued the bargainees for the purchase money, and it was held that he could not recover, the court deciding that the agreement was for the sale of an interest in land, and so within the statute of frauds—nothing having been done in execution of the agreement. But there is no vital resemblance between that case and the one now under consideration. There the suit was founded upon an *unexecuted* parol contract, and was brought to recover the unpaid purchase money.

Here (assuming that the receipt was intended to cover the matters now in litigation) the purchase money was paid down and in full, if the transaction can be regarded as partaking of the nature of a purchase. At all events the contract was executed, and upon that fact the present defense rests. The defendant is in possession and holds a perfect record title. He neither asks nor needs the assistance of the court. It is the plaintiff that is

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calling on the court for help. He invokes the extraordinary power of a court of equity to enforce what he claims as an equitable right. He agreed on the value of the supposed equity (assuming as before that the receipt covers the case — a point which will hereafter be considered) and has been paid that value in full. He accepted the sum so paid as a satisfaction, and abandoned his claim. With the consideration money in his pocket, he now seeks in a court of equity to recover the property itself! There is no equity here that a court of equity will deign to touch, and for the reason that the claim asserted is altogether inequitable and unconscionable.

The settlement, coupled with the \$6,500 payment, extinguished the plaintiff's equitable interest in the leasehold, and left nothing for a court of chancery to act upon; and this view is amply sustained by the decision in *Hughes v. Moore*, the case cited and relied upon by the plaintiff's counsel. Chief Justice Marshall, in pronouncing the opinion of the court in that case, said: "To the majority of the court it seems that a compensation for the loss of the title to the land must be understood as a compensation for the land itself, and that the *receipt of the money* by Cleon Moore [answering to Grumley in this case] would not only have barred an action for damages, *but a suit in equity for the title.*" And again: "The majority of the court is of opinion that, under the contract as stated in this count also, the *payment of the money* agreed to be paid would have *extinguished* the right of Cleon Moore [Grumley] to the land in question." That is precisely what is claimed by the defendant in the present action, namely, that the payment of the money, under the accord, extinguished Grumley's interest in the property, and barred a suit in equity for its recovery. The decision in *Hughes v. Moore*, instead of sustaining the plaintiff's theory, completely undermines and overthrows that theory in its application to the facts of the present litigation. (See *Altham's case*, 4 Coke, 305-6; *Perkins v. Forniquet*, 14 How. 315; *Vedder v. Vedder*, 1 Denio, 259.)

But the main question in the case is, treating the plaintiff's receipt as a good and valid instrument, sufficient to accomplish all the objects intended by it, what is its real scope and true construction? Does it include the claim asserted in this action?

In the execution of that instrument the plaintiff acknowledged the receipt of \$6,500 and declared the same to be in full satisfaction of a judgment which he had recovered against the defendant and his former partner David S. Bigham, and that the sum so received was also "in full satisfaction of all claims and demands" then held by him "against said Bigham and Webb, *or either of them.*"

It appears from the receipt that the money was paid by Webb, and the discharge seemed to embrace several claims against Webb, as well as joint claims against him and Bigham. It was nevertheless held by this court, when this suit was here on a former occasion (see 44 Mo. 456), that the general words of the receipt, namely, the words "all claims and demands," construing the receipt upon its face and according to its terms, pointed to the judgment specifically named in the receipt, and that they had no reference to any separate or several liability against Webb, not embraced in the judgment. To that extent the construction of the receipt must be regarded as judicially determined. It is therefore settled judicially that the receipt *upon its face* did not include and discharge the cause of action upon which the present suit is founded. The court, however, did not stop there, but went on and held further that this narrow construction was not necessarily the true construction. It was held that the receipt, "like all contracts, must be interpreted and construed from existing facts, and in the light of surrounding and cotemporaneous circumstances."

Accordingly the court proceeded to inquire into these facts and circumstances, and a majority of the court, upon a review of the evidence as it then stood, reached the conclusion that the evidence then appearing in the record failed to show that the plaintiff "had any idea that the settlement included the second suit"—that is, the suit last commenced, which was pending when the settlement was effected, and which will hereafter be more fully referred to. The narrow construction was therefore adhered to, and an interpretation given to the receipt which narrowed its scope to the particular claim (the judgment) therein described. It will therefore be seen that the construction of the

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receipt was made to turn, in the end, upon the decision of a question of fact, namely, whether the second suit was or was not understood by the parties to be included in the antecedent settlement. The court, upon the evidence then before it, failed to find the existence of such understanding, and accordingly held the second suit not to be embraced in either the settlement receipt. The judgment of the court below (which was defendant on the first hearing) was thereupon reversed and cause remanded for a re-trial in accordance with the views announced in the opinion.

The re-trial was had, and resulted in a judgment for the plaintiff. The case is now here for a second review, and the question in regard to the scope of the settlement, and consequently of the receipt, is again up for consideration, but upon evidence materially different from that embraced in the former record. If the second suit was embraced in the settlement, then it is agreed that the receipt must be construed with reference to that fact, since otherwise the clear and manifest intention of the parties would be frustrated. If the second suit was included, and the receipt is construed with reference to that circumstance, then its general words, "all claims and demands," must have a broad application and be interpreted so as to include more than the named judgment. If they include anything beyond that, then the narrow construction must be abandoned and the general words of the receipt allowed to operate according to their usual legal import, and as including every claim at the time held by the plaintiff against the defendant, whatever its name or character.

It has not been claimed, and cannot be with any show of reason, that the receipt was less comprehensive than the settlement. The material question, therefore, is—as was the fact when the case was previously here—what did the settlement include? or, in other words, did it include the second suit?

The case was tried the second time in the court below *de novo*, in accordance with the mandate of this court remanding the cause, and the trial resulted in the accumulation of a very large amount of testimony, occupying some 500 pages of the record. That testimony I now propose to examine with reference to its bearings upon the question already propounded.

The evidence shows that at the time of the settlement, two suits were pending in favor of the plaintiff—one against the defendant and his former partner, Bigham, and the other against the defendant alone. The suit against Bigham & Webb was first commenced, and was brought to recover the rents and profits of the same leasehold which constitutes the subject-matter of the present suit, and which is described in the present petition. It was sought also by that suit to recover the title to the leasehold; the legal title then, as now, being in Webb. The suit in its general objects was not materially different from the present one. The other and subsequent suit, which has been referred to as the "second suit," was against Webb individually, and was brought to recover the value of the material entering into the construction of the buildings which were standing upon the leasehold premises. This second suit was commenced in September, 1864, some six months before the settlement was concluded, and while the settlement negotiations were pending.

We shall be aided in determining the question whether that second suit was or was not included in the settlement, by a recurrence to the subject-matter of the two suits, to the negotiations which culminated in the settlement, and to the dealings and relations of the parties to said litigation. The following facts are not in dispute: In October, 1855, the plaintiff was the owner of the leasehold in question. He was then in embarrassed circumstances, and had allowed ground-rent and taxes to accumulate against the property. The property was also subject to a deed of trust and to the encumbrance of a judgment lien. His affairs were in this embarrassed condition when he applied to Bigham & Webb, a real estate firm, composed of the defendant and said Bigham, to take charge of said leasehold and collect and apply the accruing rents.

The rents realized were to be applied to the payment of taxes and ground-rent, and to the liquidation of other liabilities then outstanding against the plaintiff. Bigham & Webb accepted the agency and entered upon the discharge of its duties. This was on or near the first day of October, 1855. In less than a week from that time, the plaintiff secretly withdrew from the

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country and remained abroad for some four years. He did not return to St. Louis till 1859. In the meanwhile the leasehold was levied upon and sold under an execution issued upon the judgment which rested against it at the time of the plaintiff's abandonment of the country. The defendant became the purchaser at that sale, taking it, of course, subject to all prior liens and encumbrances.

The subsequent difficulties between the parties may be regarded as dating from that transaction. When the plaintiff returned from Europe in 1859, he called upon his agents, Bigham & Webb, and demanded of them an accounting and the reversioning in himself of the title to the leasehold. These demands were not complied with as regards the rents which accrued after the above-mentioned execution sale, and as regarded the transfer of the leasehold itself. The defendant claimed both as his. The plaintiff thereupon commenced a suit against Bigham & Webb to recover the rents and to re-acquire the title to the leasehold, alleging in his petition that the defendant held the title as the plaintiff's trustee. It was asked that an accounting should be had, and that the title should be divested out of Webb and reversioned in the plaintiff.

The plaintiff, May 11, 1864, recovered a judgment against the defendants in that suit for the sum of \$11,522.54, as the net balance of rents then in arrear to him. The judgment was so far erroneous and excessive that the plaintiff's counsel had no expectation of being able to sustain it. An appeal was taken, or arranged to be taken, and thus the matter rested for ten months, pending negotiations for a compromise settlement.

Subsequent to the rendition of this judgment, and while the negotiations were going forward, the plaintiff instituted another suit against Webb individually, being the action already referred to as the "second suit." The object of this suit, as has been stated, was to recover the value of the material entering into the construction of the buildings standing upon said leasehold, the defendant being in the possession and use of them.

It has already been stated that both the suits above referred to were pending and undisposed of on the 7th of March, 1865,

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when the parties came together and effected their settlement. These suits were prosecuted by Col. Broadhead, as the plaintiff's attorney and professional adviser.

Soon after the rendition of the judgment for the \$11,522.54, negotiations were set on foot, having for their object some sort of an adjustment between the contending parties. Col. Broadhead, on the part of the plaintiff, and Judge Krum, on the part of the defendant, appear to have taken a leading part in these negotiations. Everything that was done at all was done under their guidance, counsel and supervision. A settlement was effected, and they in their professional relations were parties to it; they were conversant with every detail, and I shall spend no time in arraying the evidence with reference to the establishment of the proposition that they acted intelligently and knew perfectly well what was proposed to be done and what was in fact accomplished. These eminent gentlemen both agree in the statement that the settlement included both suits.

Col. Broadhead testifies guardedly, but on that point he is clear and positive. He understood both suits to be included in the settlement, and testifies that he supposed his client so understood it also. He testifies that Judge Krum *insisted* upon including both suits; that he yielded to the demand; and Broadhead, on the part of the plaintiff, was the negotiator, as appears not only from his testimony but from that of his client. There is no doubt about the scope of the settlement as it was understood by the plaintiff's counsel, who had the matter in charge. He understood, and had the best of reasons for his opinion, for he was in a position to know the facts, that both suits were included. He testifies also that his "impression" at the time of the transaction was that "Grumley knew all about it." Whence came that impression? From what quarter was it derived, if not from his own client?

Col. Broadhead not only "understood" the second suit to be included in the settlement—he *acted* upon that understanding, and dismissed the suit on the very day of the settlement, and it has never been revived. The suit was not only dismissed—it was dismissed at Webb's cost. If the second suit was not

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included in the settlement, why was Webb charged with these costs? It is not to be supposed that he would have paid them had he not believed that the dismissal meant something.

But the plaintiff swears, and the exigency of his case is exceedingly pressing on that point, that the dismissal was the unauthorized act of Col. Broadhead. This, to say the least of it, was placing Col. Broadhead in an undesirable position. The fact asserted is one not likely to occur; it is highly improbable, and requires strong support to secure a belief of it. It is not supplied by Col. Broadhead's mere want of definite recollection upon the subject, nor by the fact that no definite instructions to dismiss were given. Grumley's attorney was warranted in doing what was appropriate to the general scope of the settlement, without waiting for specific instructions in regard to the details of the transaction. The dismissal was a mere incident of the settlement, if the settlement included both suits. Besides, the plaintiff's conduct, subsequent to the settlement, shows that he had abandoned the suit; that it was not only dismissed from the records of the court, but from the plaintiff's care and attention.

The suit had been pending six months when the settlement was made. In the ordinary course of business the day for the trial could not be distant. Did the plaintiff interest himself about it? Did he make any preparation for the impending trial? Did he even consult his counsel on the subject? Nothing of the kind appears, and he swears that he was in ignorance of the dismissal until his cause had been out of court for nearly a year and a half.

Is such long-continued ignorance consistent with the idea that he believed himself to be a party to an important and warmly-contested pending suit? The suit was dismissed March 7, 1865, and the plaintiff's alleged claim laid dormant for nearly three years, and down to the commencement of this suit, February 6, 1868. The plaintiff's temporary absence in Memphis explains nothing. He was still in easy reach of his counsel, and his absence did not arrest the business of the courts, or stay the progress of his suit.

If the investigation were to stop here, and the case were to be turned upon its undisputed facts, and the testimony of the plain-

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tiff coupled with that of his counsel in the former litigation, I should find it difficult to resist the conviction that the aforesaid second suit was included in the settlement, and that the entire litigation in regard to that leasehold was understood by both parties to be closed up and forever put to rest. But there is much more in the case that tends in the same direction, and the attitude of the controversy makes it necessary that I should refer to the remaining evidence.

The two suits pending at the date of the settlement related to the same piece of property, and were so connected that the mention of one of them would naturally suggest the other. Neither could have been overlooked or forgotten in the settlement. Suppose the parties took both suits into consideration, and that they intended to settle both, what papers would have been appropriate to that end? In one a judgment had been rendered; therefore a discharge of record was necessary in order to clear the records of the judgment lien; in the other no judgment had been rendered, therefore a mere dismissal was all that was necessary to clear the records of the court. But the dismissal did not discharge the cause of action; therefore a third party was necessary in order to extinguish that.

On examination, the papers actually executed on the occasion are found to meet perfectly all these conditions, furnishing a strong circumstantial confirmation of the correctness of the theory that both suits were included in the settlement. The papers referred to are as follows:

THE ORDER TO ENTER SATISFACTION.

"Wm. Grumley v. David S. Bigham, Wm. G. Webb, and Charles Pond. In the St. Louis Circuit Court.

"I acknowledge to have received full satisfaction of the judgment recovered in the above-entitled cause, and authorize the clerk of the court to enter satisfaction of said judgment on the records.

(Signed)

WILLIAM GRUMLEY.

"St. Louis, March 7, 1865."

If the object of the parties had been to discharge this judgment and nothing more, no other paper than that copied above was necessary. Still the parties were not content with that, and

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the following papers were drawn up and executed on the same occasion :

THE ORDER TO DISMISS.

"Wm. Grumley v. William G. Webb. In the St. Louis Circuit Court.

"On the payment of the costs in this case by defendant, this suit is to be dismissed. (Signed) SHARP & BROADHEAD.

"St. Louis, March 7, 1865."

THE GENERAL DISCHARGE.

"Received from Wm. G. Webb six thousand five hundred dollars, which is in full satisfaction of a judgment recovered by me against said Webb and David S. Bigham, in the St. Louis Circuit Court, and said sum is in full satisfaction of all claims and demands I have or hold against said Bigham and Webb, OR EITHER OF THEM,* up to this date.

(Signed)

WILLIAM GRUMLEY.

"St. Louis, March 7, 1865."

In view of the facts already developed, is it possible to look at this array of papers and then come to the conclusion that the parties intended nothing more by them than the discharge of that single judgment? Yet that conclusion must be reached or the plaintiff's case is lost. For if anything was intended beyond the cancellation of the judgment, then the general words of the receipt, "all claims and demands," must be construed so as to take effect and carry out what was intended to be accomplished by them. As has already been remarked, if they are construed to include anything beyond the judgment, then they include every claim which the plaintiff may have had against the defendant at that time. It is, moreover, to be borne in mind that the papers were drawn up and executed under the advice of counsel among the foremost in the State. It is not to be supposed that they acted and advised without a legal reason for their conduct.

Besides all this, Grumley is not represented as a man destitute of sense. He knew all about the suits and the purpose of them. Did he sit down and read that general discharge, as the evidence shows he did, and that, too, under the eye of Col. Broadhead, and not have his attention arrested by that sweeping clause which declares that the \$6,500 was paid and received as in full satisfaction of all claims and demands he then had or held against said Bigham and Webb, *or either of them?*

* The capitals and italics are those of the court. [REP.]

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Grumley testifies that he read the receipt upon the special direction of his counsel, and that Col. Broadhead stood over him when he signed it. Broadhead testifies that the settlement included both suits; that Krum so insisted, and that he "yielded." Thus understanding the matter, and standing over his client when the latter signed the receipt, he testifies that he "*explained*" the document to him.

Thus it appears that when the settlement was at its crisis, and upon the point of consummation, Broadhead and Grumley examined that most important paper which was to stand as enduring evidence of the scope and terms of the arrangement; that Grumley read it, and that Broadhead explained it to him. Broadhead knew that both suits were included in the arrangement—knew that the other party so understood it; and with all this knowledge he explained the receipt to his client. Did he give a full and true explanation according to his sworn statement of the understanding between him and Krum? or did he suppress and keep from his client's knowledge a material part of the transaction? There is nothing in the case to warrant a suspicion of concealment, and Col. Broadhead did not *forget* the second suit. It was present to his mind on that very occasion, as is shown by his written order to dismiss. The order bears the same date with the other papers, and Col. Broadhead testifies that it "looks like they [the three papers] all ought to go together;" and there is no evidence to show the contrary of that.

I have hitherto considered the case with reference to its undisputed facts, as these facts are explained and illustrated by the plaintiff's testimony and that of his former counsel. I now recur to the testimony on the part of the defendants.

Judge Krum was Webb's counsel. He testifies that on the 7th of March, 1865, Webb and Grumley came to his office and announced to him that they had "come to a settlement of all their difficulties," or words to that effect; that it was then stated to him that Webb was to pay \$6,500 and the costs of both suits. He was, as he testifies, requested to draw up the proper papers evidencing the settlement. Before doing so, as he testifies, he addressed the parties as follows: "Now, gentlemen, I under-

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stand that this is a settlement of the whole controversy about this property between you." He states that he understood both to assent to this, and that he then proceeded to draw up the papers. The papers are all in his handwriting—that is, the three papers already given. It appears that there was a prior understanding between Broadhead and Krum, that the latter, in case a settlement was effected, should favor the passing of the money to be paid by Webb through Broadhead's hands. Krum testifies that in pursuance of this understanding, and for the further reason that he wished the counsel of the opposite party to be cognizant of the papers, he proceeded with Grumley, after the papers were drawn up, to Col. Broadhead's office, where, as he says, the transaction was closed in his presence. He is not certain whether Grumley accompanied him, or whether he might not have met him at Broadhead's office by appointment. Webb corroborates Krum fully as to what occurred in the latter's office in Grumley's presence.

Now, if these witnesses (Webb and Krum) are to be believed, their testimony establishes the fact that the second suit was included in the settlement, and that Grumley knew it. Why should they not be believed? As regards what occurred in Krum's office—and that is the important matter in this connection—Grumley is the only witness that contradicts them. He sets up an *alibi*, and sustains it by his own oath. He swears that he was not in Krum's office on the day mentioned, or on any day near that time. He is in direct conflict with Webb and Krum. The testimony on this point is irreconcilable. Who is to be believed? If Grumley was not in Krum's office on the 7th of March, 1865, then the testimony of the witnesses who affirm that he was, is to that extent a pure invention. The interested parties may be treated as balancing each other, but what shall be done with the testimony of Judge Krum? His statements, if credited, are decisive of the case. He is sustained by Webb and contradicted by Grumley.

Grumley denies that he was in Krum's office as stated. He denies, too, that Broadhead had any authority to dismiss the second suit; and denies further, and over and over again, and

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in forms the most positive, that prior to the day of settlement Broadhead was authorized to settle the first suit for less than \$11,522.54, that being the full face of the judgment. Yet it is an undisputed fact in the case that prior to that date, Broadhead had been negotiating for months for a compromise settlement of the judgment; that he offered to discount from its face thousands of dollars, and that he finally acquiesced in a settlement at considerably less than half the face of the judgment; and further, that Grumley instantly ratified his acts in that behalf and gave a discharge in full of all claims and demands. According to Grumley's own statements, Broadhead acted throughout the negotiations as a mere volunteer and intermeddler, and without the slightest shadow of authority. But it is manifest from the case—and counsel do not attempt to controvert the fact—that Broadhead's negotiations in respect to the judgment were duly authorized. Grumley's denials on that subject must therefore go for nothing. If these are set aside as wholly unreliable, what becomes of his denials of Broadhead's authority to dismiss the second suit? His rash swearing in regard to the former, shakes the credit of his testimony in regard to the latter. He no more denies authority in the one case than in the other. His unsupported statements cannot be accepted as sufficient to countervail the testimony of both Webb and Judge Krum, the latter being a pecuniarily disinterested witness. It is alike more reasonable and charitable to suppose forgetfulness on the part of Grumley rather than invention on the part of the opposing witnesses.

It is an entire mistake to suppose that there is any serious conflict between Judge Krum and Col. Broadhead. They differ as to details, but agree perfectly as to the substance of the settlement—that it was understood to include both suits.

If the two suits were included, and Grumley so understood, the surrounding circumstances of the settlement cease to be of any moment; for they are important only as showing the understanding of the parties as to the scope of the settlement.

It may be remarked, however, that Col. Broadhead's recollection of the details of the transaction are not distinct, and he admits his inability to explain some of the undoubted facts of

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the case so as to make them harmonize with certain of his impressions. He thinks, for instance, that Judge Krum was not with him and Grumley, in his (Broadhead's) office, when the papers were examined and executed, but he admits that \$6,500 of Webb's money was there, and he is not able to explain its presence in his and Grumley's control, with no one there to represent the owner. Assume Judge Krum's presence—and he swears positively that he was there—and the transaction is relieved of its obscurity. Krum must have been present.

I have, to this point, considered the merits of the case apart from the merits of the contested settlement. That may deserve a brief consideration. When this cause was previously here, the record was quite barren of facts showing the state of the rent account between the plaintiff and defendants in the first suit. It was shown that a judgment had been rendered for \$11,522.54, as for rent unaccounted for. The fair presumption was that the judgment, although excessive, was nevertheless somewhere in the vicinity of what was right. The evidence before us now dispels that illusion. The account is now presented and appears in the record in detail. Instead of showing an unpaid balance of \$11,522.54, it shows a balance of only \$4,089.19, thus evincing an error in the judgment of \$7,433.35. The account, or the results of it, as the evidence shows, were exhibited to Grumley before the settlement, so that he acted with a knowledge of the facts.

Then again, the second suit indicated a claim of considerable gravity; \$7,000 was claimed, and the claim did not appear to be extravagant for a dozen houses. But it is now shown, and by one of the plaintiff's witnesses (Rhodes), that the buildings sued for, in their then condition, were cheap and nearly worthless structures. He values them at from \$50 to \$100 each, and he says there were twelve or fourteen of them. Suppose they were worth, in the aggregate, \$1,500; that sum added to \$4,089.19 makes \$5,589.19, and this latter sum represents the total of the plaintiff's claims, under both suits, as those claims stood on the day of the settlement—Bigham & Webb being credited their commissions, and no interest being computed on either side.

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The balance of interest was in favor of the plaintiff, although Bigham & Webb were considerably in advance in the earlier stages of the account. These facts were all known to the plaintiff when he received the \$6,500 and gave a receipt, expressed to be in full of all claims and demands, and the receipt was explained to him by Col. Broadhead, who knew that all the claims in litigation were included in the settlement according to his understanding of it, and according to the understanding of the counsel of the opposite party. Did he succeed in making his client understand the receipt as he understood it?

I deduce from the evidence, upon a careful review of it, the following summary of leading facts:

1. Col. Broadhead was the authorized and fully trusted representative of the plaintiff in his negotiations for a settlement. He was of the opinion, as he testifies, that Grumley would have settled for \$3,000 had he advised it.

2. In these negotiations Broadhead came to a clear and definite understanding with the counsel of the opposite party that the settlement should include both suits. That was *insisted* upon and he yielded to the demand.

3. It therefore appears that the plaintiff's counsel, Col. Broadhead, knew that the settlement was understood to include the second as well as the first suit, and that it was understood by himself and the opposite party to be embraced in the receipt.

4. Thus knowing and understanding the facts of the settlement, he expounded the receipt to his client. If the exposition was a fair one — and the contrary is not pretended — Grumley was thereby advised of the scope of the settlement and the import of the receipt as the same were understood by Broadhead and the opposite party. In a word, he was made to "know all about it," and Broadhead testifies, as we have seen, that he supposed at the time that such was the fact.

5. This matter is not left to inference alone. Grumley's knowledge is shown affirmatively by the testimony of Judge Krum. I find it to be true, as testified by this witness, that Grumley was in the witness's office on the day of the settlement in company with Webb, and that he there recognized the settlement as including the subject-matter of both suits.

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6. Grumley's subsequent conduct accords with this view, and is inconsistent with the notion that he believed the second suit was left to be fought out in the courts. He gave it no attention thenceforward for nearly a year and a half, or at least not enough attention, according to his own swearing, to ascertain that it had been dismissed, untill it had been out of court nearly eighteen months.

7. The settlement, assuming it to have embraced both suits, was still fair and reasonable. The evidence shows that the \$6,500 paid by Webb was a full equivalent for the balance due on the rent account, and for the value of the houses sued for in the second suit.

Now the receipt, as we have seen, must be construed in the light of these facts, and, being so construed, the result is in no way doubtful. The narrow construction, limiting its effect to the specific judgment, must be abandoned, and the broader construction, which gives effect to its general terms, adopted. These terms are comprehensive enough to embrace and discharge the second suit, and all causes of action then existing in favor of the plaintiff against the defendant, whether joint or several, and that is their effect.

From this it follows that the judgment of the court below, which was in favor of the plaintiff, must be reversed and the petition dismissed. I recommend that disposition of the case.

Judge Bliss concurs. Judge Wagner dissents.

BLISS, Judge, concurring.

I concur in the opinion of Judge Currier. The case has been remanded and re-tried upon an amended answer, and upon the principles settled when it was formerly before us. The record is much fuller than before, developing new and material facts; and whatever, then, the contradiction and doubt as to the intention of the parties in using the general language of the receipt, that intention is now made clear; and it is apparent that both Mr. Grumley and his attorney and Mr. Webb and his attorney understood the receipt alike, and, though the judgment was the chief matter in controversy, that they intended to cover by it not only

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the judgment but the matter then in suit and everything pertaining to the lease. It is undisputed that Mr. Webb and his counsel and Mr. Grumley's counsel so understood it; that the former at all times insisted upon this comprehensive settlement, and the latter conceded it. Mr. Webb and Mr. Krum insist that the pending suit was canvassed between them and Mr. Grumley, and that both matters were settled. Mr. Broadhead understood that the whole matter was settled, supposed Mr. Grumley so understood it, and explained the receipt to him. Every circumstance tends to show that all parties so understood it. To trust, then, to Grumley's present recollection that he did not so understand it, would reverse all my ideas in regard to the preponderance of evidence. A question of law not before considered is now insisted on, to-wit: that the right of Grumley to the renewed lease and to the property upon the leasehold premises could not be surrendered by parol; or rather, that the scope of the receipt cannot be extended by parol so as to affect the plaintiff's claim to the leasehold. Had this point, when before presented, been considered and sustained, it would have dispensed with any inquiry into the understanding of the parties.

The statute of frauds applies equally to legal and equitable estates in lands. As a rule, neither can be "assigned, granted, or surrendered;" nor can valid contracts be made for their assignment, grant, or surrender, except by note in writing. But if there were no exception to this rule, the statute could be made a potent engine of fraud. Hence the clear and marked exception that when the parol agreement has been performed in part, by taking possession and paying the purchase money, the agreement may be enforced and the title wrung from the vendor, notwithstanding the statute. To refuse to compel him to deed would work a fraud, and the letter of the act yields to the spirit of the law, and he is forbidden to set it up. So in regard to the sale or the surrender of an equity. An unexecuted agreement may not be enforced, but one who sells his equitable interest in land, receives the consideration, and yields possession, will not be permitted to say afterward that the assignment was not in writing; or, if the holder of the equity surrenders to him who has the legal

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title, accepts the consideration and gives possession, the contract is executed, his equity is dead, and no court of equity would enforce it. Thus a parol rescission of a contract for the purchase of land is a surrender of the equity of the purchaser, and I have never known an instance where such purchaser, who, upon an agreement to give up his claim to the holder of the legal title, has received the value of his equity, and if he was in possession, has surrendered it, has been afterward enabled to enforce such equity.

So a deed with a separate condition of defeasance is but a mortgage, and the mortgagor holds an equity of redemption; and yet by canceling the defeasance, being unrecorded, this equity may be surrendered, given up to the holder of the paper and record title without any writing whatever, and the equity will be discharged. (*Harris v. Phillips Academy*, 12 Mass. 456; *Trull v. Skinner*, 17 Pick. 213.) I might give other illustrations of the unsoundness of the claim, that because certain parol contracts or transactions are within the statute, therefore they are void and courts will wholly disregard them. They are not necessarily void. An executed parol agreement is valid; "if it is fulfilled by the parties, it is as good as any other contract" (5 Litt. 98), and even if only partly performed, equity in a proper case will enforce it.

But in this case we need not go as far as courts uniformly go. We need not say that a verbal contract to sell or surrender the plaintiff's claim, if founded upon a good consideration, would be specifically enforced, if it should be found necessary for a defendant to appeal to a court for that purpose; but it seems very clear to me that the plaintiff himself could not come into court for its equitable aid, as though no such surrender had been made. The plaintiff had an equitable, unadjusted claim upon the renewal of a certain leasehold. He prosecuted a claim for the improvements upon the leasehold property; subsequently the parties settle their controversies, including this suit and all matters pertaining to the lease, and the plaintiff receives the money demanded. Everything was done that could be done in execution of the settlement; the money was paid, a receipt was given, the

suit was dismissed, and the defendant was left in the quiet enjoyment of the property. No deed of release was necessary, for defendant had a perfect record title, and no possession could be delivered, for it was already had; and now, with the money in his pocket, the plaintiff again comes into a court of conscience to enforce his original claim, and being confronted by his discharge, replies that it was not in writing, and that he is entitled to the same aid as though it had never been given. The claim so affronts all my ideas as to the office of a court of equity that its statement seems to me to refute it. No greater fraud could be practiced than to enforce a claim thus relinquished. The plaintiff is estopped from pursuing it.

In *Campbell v. Johnson*, 44 Mo. 247, the doctrine of estoppel was applied to a similar state of facts. A purchaser of land, complaining of the insufficiency of the deed, brought suit for the purchase money. It was paid back to her and a receipt taken. Afterward she brought suit for the land itself, and was held to be estopped by her previous settlement and receipt.

I have looked at all the cases cited, and have searched for others, but have found none where a judgment to enforce an equity was given in the face of a receipt and discharge, an accord and satisfaction, the discharge not being in writing; although in some, where the court found that there was no such discharge in fact, *dicta* are thrown out in aid of the finding, as to what might have been its legal effect.

If this were a proceeding for specific performance of a parol agreement, we should require evidence that the character of the possession, if rightful without such agreement, was changed, and that the purchaser held under the seller; but in this case no such showing is necessary, for these reasons: first, the claim supposes the possession wrongful; it was certainly adverse, and acquiescence in it has a very different significance from that which it would have if it were rightful or held under the other party; and, second, one may be estopped in equity by transactions between him and his opponent from prosecuting one kind of claim, although such transactions might not suffice to lay a foundation for affirmative relief on his behalf.

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I have said nothing in regard to a distinction which might be made between a parol discharge by the equitable owner of land by contract or other writing, which gives the holder an express interest, and by one who may have a claim by operation of law, not embraced in the terms of any agreement, and which can only be reduced to certainty by judgment; nor have I spoken of the fact that this discharge was not by parol, but that a receipt in writing was given, though not technically a release, yet broad enough in its terms, if so understood, to cover every claim legal or equitable the plaintiff could have had; but I have chosen rather to recognize the broad principle that courts of equity will not be made the ministers of fraud by enforcing claims that have been paid off and discharged.

WAGNER, Judge, dissenting.

When this case was here on a former occasion (44 Mo. 444) it was decided that Webb held the property in trust, that he possessed the dry legal title, but that the equitable interest was in Grumley, and that the latter was entitled to have the leasehold interest assigned to him, and also to have an account of the rents and profits.

It was further held that the compromise entered into between the parties, by which Grumley took and received \$6,500 for the judgment which he had obtained against Webb for \$11,522.54, did not include a second action which he still had pending against Webb, and was therefore no bar to the prosecution of this suit.

When the case was remanded, the court below rendered judgment in conformity with the opinion of this court, and appointed a commissioner to take an account, who, after hearing the proofs, stated the amount due the plaintiff, and his report was confirmed.

The defendant has now appealed, and it is sought to draw a different conclusion from the facts from what was arrived at by this court upon the former hearing. The decree declaring Webb a trustee and holding the title for the benefit of Grumley is not attempted to be disturbed.

From a careful examination of the evidence, I have been wholly unable to find any material difference between the evi-

dence as now presented and what was given on the former trial. There are slight alterations of statements and unimportant differences of phraseology, but the facts are substantially the same. It would be useless and profitless to undertake anything like a thorough review of all the testimony. All attempts to reconcile and make it harmonize are perfectly futile, for it is conflicting throughout.

Bigham, who was employed by Webb as his agent to try and effect a settlement with Grumley, shows clearly that the judgment alone was settled. He says that he was employed by Webb to settle the judgment, and nothing else. He offered Grumley several times either \$6,000 or \$6,500 for the judgment; understood that it included everything, and that the buildings were to belong to Webb; but don't know that he said anything to Grumley as to whom the buildings should belong to, and he knew of no other difficulty between the parties but the judgment.

Grumley swears positively that no one ever spoke to him about settling anything but the judgment for \$11,522.54, and that he received the \$6,500 for that, and for that alone.

The testimony of Broadhead shows conclusively to my mind that nothing but the judgment was settled, though he states during the course of his examination that he understood, or had an impression, that everything was settled. He says that both Krum and himself thought that the judgment was for too much, and he and Krum negotiated for a long time for its settlement. Krum insisted that the error should reduce the judgment to \$5,000, while he insisted that it should not reduce it to less than \$7,000, perhaps not less than \$8,000 or \$9,000, and finally they agreed on \$6,500. Now what was this agreement for? Why, most plainly, for that about which they had been negotiating—the judgment.

Broadhead testifies that he closed the settlement with Krum. Krum testifies that Broadhead is mistaken, and that they did not close the settlement. He says he drew up the papers in accordance with an agreement which Webb and Grumley had made in his presence, and that he then and there drew up and read to the parties the three papers, "or rather two of them," and that he

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then went with Grumley to Broadhead at the latter's office, and there passed the papers and the money. Broadhead, on the contrary, says that he got the papers from Krum, and that Grumley was not present when he got them, and is sure that Grumley never saw the order of dismissal of the \$7,000 suit, one of the papers drawn up by Krum, and that Grumley was not present at any time when he spoke to either Krum or Webb; that he, after getting the papers from Krum, closed the matter himself with Grumley, at his own office, and that neither Webb nor Krum was there; and that Grumley came to his office to settle, by an appointment with him, and he is quite sure there was no one with Grumley when he came. And that is Grumley's evidence, for he says that after having refused to compromise with Webb, Bigham and Brown, on the morning of the settlement, Broadhead called upon him, and then finally prevailed upon him to accept \$6,500 for the judgment; that upon giving his consent Broadhead told him to come to his office in half an hour and he would have the papers; that he went to Broadhead's office in half an hour, and Broadhead had the papers and the check, and there settled with him, with no one present but Mr. Haeussler and Mr. Sharp. And this is wholly and fully sustained by Broadhead; for though he says he understood everything was settled, yet he also says he spoke to Grumley about nothing but the judgment, and had no authority to settle anything but the judgment; had no authority to dismiss the \$7,000 suit, but dismissed it entirely on his own responsibility, and Grumley knew nothing of its dismissal, and did not see the order of dismissal, and insisted on his going on with that suit.

Such is the statement of Broadhead and Grumley, while Krum says that Webb and Grumley made the agreement in his office, and he expressly asked them if the settlement was to include all matters in controversy between them, and they said that it was.

The evidence is contradictory, but the conclusion seems to me irresistibly plain that Grumley never agreed to nor contemplated settling the \$7,000 suit pending in the court at the time.

The judgment for upwards of \$11,000 was obviously for too much. It was a lien on Webb's real estate, and he could not use

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it, and therefore was anxious to have the matter adjusted. All the negotiations were about the judgment. Krum, the attorney for Webb, contended that it should not be more than \$5,000, while Broadhead, the attorney for Grumley, insisted upon \$7,000, or perhaps \$8,000 or \$9,000. In this position of the case they agreed upon \$6,500. It is obvious that the judgment was alone in contemplation when the adjustment was made. If Krum and Webb thought otherwise, surely Grumley did not, and without his concurrence there could be no agreement, for the mutual assent of both parties was necessary to make a binding contract. The facts surrounding the execution of the papers go to strengthen and sustain this view. Two papers only were submitted to Grumley for his signature. Both these related to the judgment; the one acknowledged the receipt of the money, and the other was an order for entering satisfaction on the record.

The third paper prepared by Krum, dismissing the suit, was not presented to him, nor did he know anything about it, but it was signed on the same day by his attorneys. There is something in this transaction that goes entirely to rebut and dispel the presumption that Grumley ever intended to compromise the \$7,000 suit, or that he assented to any disposition being made of it. While Broadhead seemed to think that everything was settled, he clearly states that nothing was said about anything but the judgment. He had no authority from Grumley to settle the suit, and consequently Grumley would not be bound by any arrangement he made; for it is settled law that an attorney employed in the usual way to conduct a suit has in general no authority to enter into a compromise without the sanction, expressed or implied, of his client. (North Mo. R.R. Co. v. Stephens, 36 Mo. 153; 1 Pars. Cont. 117.) But the simple dismissal would amount to nothing, and would not preclude another suit being instituted for the same cause.

Some stress is laid on the fact that Grumley went to Memphis, and was gone more than a year, and paid no attention to the suit, and thence the inference is sought to be drawn that he knew it was abandoned. But this presumption or inference will not hold good. In the crowded state of the docket in the St. Louis

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Circuit Court, it is sometimes years before a case is reached. It is not usual for a client to attend the court to give the case his personal attention before it is reached. He employs an attorney who attends to the matter and advises him when his presence is required.

Besides, Grumley made repeated inquiries of his counsel concerning the suit. The fact appears to be that Broadhead had no confidence in the suit. He was satisfied that it was not maintainable, and therefore was willing to abandon it. He might have been right in his views of the law, but that should not operate to Grumley's prejudice.

While I think it is clear that Grumley never intended to compromise, and did not compromise, the \$7,000 suit, the fact is patent that there is some conflict in the evidence. Now the receipt specifies that the money was received in full satisfaction of the judgment. Is it not natural to conclude that if the pending suit was intended to be included, it would also have been specified in the writing? Both matters were of importance and covered distinct suits, and it is incomprehensible that if both were expressly settled, one should have been specifically designated and the other left entirely out. It was clear that the parties' minds were directed to the judgment and that only.

If the pending suit as well as the judgment had been presented to the minds of the parties, it is natural to suppose that the language used would have given some indication of it. And this would be especially the case when we consider that the writing was drawn up by Judge Krum, who has spent a long life in the profession.

When this subject was considered by the court when the case was here before, we held that the receipt given in full satisfaction of the judgment, and specifying also in full of "all claims and demands," would not bar the prosecution of this suit unless it were shown to have been intended by the parties to include the \$7,000 suit; and as the evidence was contradictory, we construed it according to its legal import. The authorities were examined, and the rule deduced as the settled doctrine was, that language, however general in its form, when used in connection with a par-

ticular subject-matter, will be presumed to be used in subordination to that matter, and will be construed and limited accordingly.

The case is essentially the same as it was when it was here before, and ought not to be again re-examined; for where a case has been decided by this court, and again comes here by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata* and no longer open to dispute. (Overal v. Ellis, 38 Mo. 209; Roberts v. Cooper, 20 How. 467.)

There is another question to be considered, and that is the statute of frauds. Although Webb procured the lease in his own name, yet the equitable title is in Grumley. Has Grumley in any way ever parted with his equitable interest in this new lease?

I think he could only part with it in the way of a voluntary transfer by a writing in conformity with the statute. Grumley's estate in the new lease is created "by operation of law," and it is now sought to divest him of it not in the same way, but by voluntary conveyance in the way of bargain and sale.

The doctrine is that in cases of voluntary conveyance of an interest in land, whether legal or equitable, parol testimony is inadmissible. This is a case of divesting an equity; it is not attempted to show that the equitable estate never did vest, but that after it had been vested a year and a half, the owner thereof voluntarily sold and parted with it.

The statute of frauds provides that "no leases, estates, interests, either of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents lawfully authorized by writing, or by operation of law." (Wagn. Stat. 65, § 2.)

This section extends to and embraces all interests in land, equitable as well as legal. This construction is well settled. (Browne on Frauds, § 229.)

The only case relied on to evade the statute, and turn the cause in favor of the defendant Webb, is Hughes v. Moore, 7

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Cranch, 176. It was an action of assumpsit. The declaration stated that Moore was owner and proprietor of a plat and certificate of survey for lands lying in Kentucky, for which he was entitled to a patent from the government of that State, and that Hughes without authority transferred that plat and certificate in the name of Moore to himself; by which wrongful act a patent issued for the land to Hughes, to the injury of Moore; that afterward Hughes promised to pay Moore the sum of seven hundred pounds for the said injury and loss of the said land assigned as aforesaid; the plaintiff Moore (defendant in error) at the time agreed to the terms, and to accept of the said compensation "in full of all claims and demands for the said land, and for the injury aforesaid." That was the second count. The third count stated the equitable title of Moore and the injury, etc. It then stated a conversation "concerning a compensation for the loss and a liquidation of the damages sustained by Moore, by reason of the misconduct of Hughes, and of vesting him, Hughes, with the legal title to the land; and that it was agreed that Hughes should pay Moore in satisfaction of the damages, etc., the sum of seven hundred pounds, etc., which Moore agreed to accept in full compensation for his just claims as aforesaid."

To each of these counts defendant Hughes pleaded several pleas; among others, that neither the promise nor any memorandum thereof was made in writing. To this plea the plaintiff demurred, and the court below sustained the demurrer. The unanimous opinion of the Supreme Court was delivered by Chief Justice Marshall. As to the second count he says: "The correctness of this decision depends entirely on the application of the statute of frauds to the contract stated in the declaration. Cleon Moore is averred to have been the proprietor of a plat and certificate of survey on which Hughes & Darby obtained a patent by using his name without authority. This tortious act did not divest Moore of his equitable title. The land in equity was his. Did he part with his title by the contract stated in the declaration? The answer must, in the opinion of the whole court, be in the affirmative. He agreed to accept of the said compensation in full of all claims and demands for the said land, and for the

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injury aforesaid. This, then, was an agreement to sell his equitable title to the land for the sum of seven hundred pounds. The court can perceive no distinction between the sale of land to which a man has only an equitable title, and a sale of land to which he has a legal title. It is therefore the unanimous opinion of this court that the judgment upon the demurrer to this plea ought to have been in favor of the defendant below."

On the third count the court divided, but the majority were of the opinion that "a compensation for the loss of the title to the land must be understood to be a compensation for the land itself, and that the receipt of this money by Cleon Moore would not only have barred an action for damages, but a suit in equity for the title." The judge then goes on to remark that "if this opinion be correct, then the contract is substantially for the sale of land, and to be valid ought to have been in writing."

But in commenting upon the fourth count it is said: "It seems to the court that this compensation was in lieu of the patent itself, and must have been intended to extinguish his right to the patent." There was no doubt in the minds of the court as to the sale of the equitable interest being within the statute of frauds. This principle was broadly decided, and is given by Judge Curtis in the head-note, in his edition of the report, as the only principle decided. The majority of the court evidently hesitated in coming to the opinion that the compensation was to be considered in lieu of the patent, and that it barred a suit for the land. The language used is extremely cautious, and while the case is often cited as a leading authority to maintain the proposition that a promise to pay a sum of money in consideration of the release of an equitable title is within the statute of frauds, I cannot find that it has ever been followed in any other case for the further purpose of extinguishing title upon parol agreement and compensation.

In *Millard v. Hathaway*, 27 Cal. 119, a case entirely parallel with the one at bar came up for adjudication. There the holder of the equitable interest sued the party having the legal title for a conveyance. The latter in his defense set up a settlement, a refunding of the money and a parol lease. The plaintiff's estate,

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as in this case, was created by evidence of facts, which by operation of law give him an equitable title. Upon this state of the case the court says: "It is alleged in the answer that after the conveyance by C. W. to E. V. Hathaway, the plaintiff released and discharged him (E. V. Hathaway) from all claim, right or title in and to said described lands. This defense presupposes that the trust laid in the complaint once existed, and seeks to avoid it on the ground of the new matter stated. The burden of proving the defense was with the party alleging it.

"The court has found against the allegation directly, and when specially moved to amend its conclusions of fact by finding that the release was at least proved by parol, the motion was denied. We have attentively examined the parol proofs as they stand relative to the question. Parol evidence was freely introduced on both sides, and we are satisfied that the preponderance is with the result that the court arrived at. But if the court refused to find the release or discharge alleged, on the ground that the fact could be proved by written evidence only, as is claimed by the appellants, still we consider that the court did not in that particular mistake the law. As already remarked, the defense went upon the supposition that the plaintiff had originally an equitable estate in the land, but maintained that the estate had become extinct by release or surrender to the holder of the legal title. A release is not by act or operation of law, but by the act of the party releasing, and therefore the act can be proved only by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

The Supreme Court of Pennsylvania says that no difference in principle can exist in the mode of transferring a legal and an equitable estate. (*Cravener v. Bowser*, 4 Penn. St. 261; 56 Penn. St. 132, 140.)

In North Carolina, Ruffin, C. J., says: "In all contracts concerning the sale of an interest in lands, the statute of frauds requires a writing signed by the party sought to be charged." (*Simms v. Killiam*, 12 Ired. 252.)

So in a case in Ohio, the court says: "First, this is an agree-

ment without consideration and not binding; and, secondly, it is within the statute of frauds, and void. No interest in land, equitable or otherwise, passes by parol only. True, a parol agreement executed by possession will be enforced. But an equitable interest once acquired in land cannot be parted with except by writing, or by the same means that it was acquired." (*Kelley et al. v. Stanbery et al.*, 13 Ohio, 408.)

In *Goucher v. Martin*, 9 Watts, 106, the court tersely announces the doctrine and declares that "it is a general rule that no estate or interest in land shall pass but by deed, or some instrument in writing, signed by the parties; and it is immaterial whether the interest be legal or equitable, as an equitable interest is an interest in land which comes within the words and spirit of the statute of frauds. * * * The very object of the statute is to prevent the divestiture of a title to real estate, equitable or legal, by the introduction of loose and intermediate proof of a contract which the law requires should be made in the most solemn form."

In *Gratz v. Gratz*, 4 Rawle, 411, Kennedy, J., speaking for the court, says: "The terms of the act against fraud I think are sufficient to embrace equitable as well as legal interests in lands. The words are 'all leases, estates, interests of freehold, or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements, or hereditaments,' etc. * * * The term 'interests' being here used without any other words to qualify or restrain its general and most extensive signification, I am unable to discover any good reason why it should not be considered and held to extend to equitable interests in lands as well as legal."

In like manner the Supreme Court in Massachusetts hold that "it is well settled that equitable as well as legal interests in land are embraced within the statute of frauds." (*Richards v. Richards*, 9 Gray, 313.) To the same effect is the case of *Smith v. Burnham*, 3 Sumner, 435; and also *Toppin v. Lumas*, 30 Eng. Law & Eq. 427.

The authorities abundantly and conclusively show that all interests in land, whether equitable or legal, are clearly within the statute of frauds, and that neither estate will pass by parol,

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but requires an instrument of writing to render a transfer of any validity. There is no distinction to be drawn between the two descriptions of estate. The language of the statute itself is so plain that it is not susceptible of any other interpretation. If an equitable interest can be passed without writing, a legal interest can be passed as well. And the very statement of such a proposition is preposterous. To allow the pretended parol agreement in this case to be outside of the statute, or even to operate without writing, effectually demolishes the statute and renders it nugatory, and is opposed not only to its express language, but is in conflict with every well-considered case on the subject.

For the reasons given in the foregoing opinion, I entirely dissent from the judgment of the majority of this court, and think that the decree rendered in the court below should be affirmed.

On Motion for Rehearing.

PER CURIAM.

1. *Practice, civil—Supreme Court—Stare decisis.*—Where, upon a second appeal to the Supreme Court, the two records are the same, the former finding should control, unless injustice to the rights of parties would be done by adhering to the first opinion.

Per WAGNER, Judge, dissenting.

2. *Statute of frauds—Sale by parol—Transfer of possession—Payment of purchase money.*—Where an equitable estate is sold by parol, a transfer of possession is essential to take it out of the statute of frauds. The mere payment of the purchase money will not have that effect.

N. Myers, with *Geo. W. Cline*, for the motion, pressed the point that the evidence in the two cases was essentially the same, and quoted extensively from the testimony of Krum and Broadhead as given at the two trials. It was urged that the words of the receipt, "or either of them," were common in legal documents, and meant simply "jointly or severally;" that Broadhead's statement that he "explained" the receipt to Grumley, on which the court laid so much stress, amounted to nothing; that such a statement was not evidence, but a legal conclusion; that what he said, what Grumley said, whether the explanation was before or after the settlement, did not appear. Counsel also contended that Webb's statement at the second trial,

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showing a balance in Grumley's favor of \$4,089.19, was purely *ex parte*, and admitted in evidence below simply as a part of the *res gestæ*, showing what Webb claimed, not what was in fact due; that in Webb's statement he charged himself with no interest, but debited Grumley with 8 per cent. commissions amounting to \$1,417.78; that on his own showing, after deducting his commissions, Webb owed Grumley, on January 1, 1864, \$5,506.97; that had Grumley received possession on his return from Europe, and a new lease, as the court said he should have done, he would have had rents up to January 1, 1864, worth, according to Broadhead, from \$8,000 to \$9,000, and the lease from 1864 to 1874, worth, as conceded, not less than \$12,000 besides — in all about \$20,000 — instead of all which he received \$6,500, a large part of which he has paid for attorneys' fees, made necessary by Webb's unjust refusal to surrender.

As to the application of the statute of frauds, the following is in substance the argument of counsel:

Judge Currier noticed none of the authorities cited except the case of *Hughes v. Moore*. That was a suit at law to recover a sum of money verbally agreed to be paid to plaintiff, first, as compensation for the loss of his equitable title; and, second, in lieu of all the damage done plaintiff by the misconduct of the defendant in depriving plaintiff of the title. The case before this court is not at law, but in equity; it is not to recover a sum of money, but to divest the title to real estate.

The opinion of Judge Bliss is short, and turns on this sentence: "One who sells his equitable interest in land, receives the consideration and yields possession, will not be permitted to say afterward that the assignment was not in writing; or, if the holder of the equity surrenders to him who has the legal title, accepts the consideration and gives possession, the contract is executed, his equity is dead, and no court of equity could enforce it."

Undoubtedly, that is the law; but it is not the law of this case, for the reason that the main element of the principle — to-wit, the transfer of possession — is not in this case. No one has ever pretended that Grumley delivered possession to Webb after March 7, 1865. Webb has held possession continuously ever

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since 1855. If the pretended purchaser is in possession before and at the time of the alleged contract, his continuing in possession amounts to nothing, and is to be ascribed to his original possession and not to the alleged contract. (Price v. Hart, 29 Mo. 173; Young v. Montgomery, 28 Mo. 605; Bean v. Valle, 2 Mo. 109; Poag v. Sandifer, 5 Rich. Eq. 181; Aitkin v. Young, 12 Penn. St. 15-24; Armstrong v. Kattenhorn, 11 Ohio, 271; Brennan v. Bolton, 2 Drew. & W. 355; Jones v. Peterman, 3 Serg. & R. 543; Phillips v. Thompson, 1 Johns. Ch. 149; Frame v. Dawson, 14 Ves. 387; Wills v. Stradling, 3 Ves. 381.)

Again, the mere payment of purchase money amounts to nothing. (Purcell v. Miner, 4 Wall. 517; Price v. Hart, 29 Mo. 173; Goucher v. Martin, 9 Watts, 107; Frame v. Dawson, 14 Ves. 387; Armstrong v. Kattenhorn, 11 Ohio, 271; Church of the Advent v. Farrow, 7 Rich. Eq. 383.)

Further, no improvements have been made in part performance of the contract. The only improvement made was in 1864, a year before the making of the alleged agreement. The act of part performance must result unequivocally from the agreement, and be such as would not have taken place but for the agreement. (Purcell v. Miner, 4 Wall. 517; Moore v. Small, 19 Penn. St. 461; Osborne v. Phelps, 19 Conn. 68; Woods v. Farmare, 10 Watts, 195 *et seq.*; McMurtrie v. Bennett, Harr. Ch. 124; Wack v. Sorber, 2 Whart. 390.)

Finally, to take the case out of the statute on the plea of part performance, the contract itself must be established by "indubitable proof" in "every part." (Purcell v. Miner, *supra*, and other authorities above cited.)

The court also overlooked this point made by us. At the time of the settlement, March 7, 1865, the only matters in controversy were the judgment for the rents of the old lease, \$11,500, and the \$7,000 suit for the value of the buildings. Had both of these been settled for the \$6,500 it would not have affected the present suit for the new lease, because the buildings are not co-extensive with the new lease; they are merely an incident of the lease. The bricks were worth but \$500, the lease not less than \$12,000.

BLISS, Judge, delivered the opinion of the court.

The plaintiff moves for a rehearing, first, upon the ground that the court has mistaken the record in supposing that it differed from the former one, and, argumentatively, that we are bound by the former finding upon the facts.

We have distinctly recognized the former opinion upon questions of law as governing the law of the case. As the record stands, we could scarcely go further. A general mandate has gone down to try the whole case *de novo* upon the principles so settled, and the record of the trial has come back increased over the old one by hundreds of pages. If we are bound by a former finding of the facts, why a new trial? Why was not a transfer of Grumley's equity adjudged, and only an account of the rents directed? It is folly to say that the facts are concluded; it is our duty again to consider them, and especially to ascertain whether the new features of the evidence throw any light upon the case. If the present record were the same as the old one, the former finding should control us, unless "injustice to the rights of the parties would be done by adhering to the first opinion" (Chamber's Adm'r v. Smith's Adm'r, 30 Mo. 156), but it is not the same.

I have looked with increased anxiety to see what the plaintiff meant by releasing not only Bigham & Webb, but also Webb, against whom, individually, he was pursuing a separate claim. When the case was formerly here, I felt great doubt upon this vital point. The evidence was conflicting; there was difference of opinion, and I yielded my doubts to what then seemed to be the equities of the case. But the evidence now makes it clear that the \$6,500 was a fair equivalent for the claims then in litigation; and there is no doubt whatever that Webb paid that sum with the full understanding that it satisfied every demand.

Mr. Krum "insisted" upon including everything in the settlement, and Mr. Broadhead yielded to it. This fact is new and important, and rests upon the undisputed testimony of Mr. Broadhead. Webb understood that everything was settled; his counsel so understood it; Grumley's counsel so understood it, and, so

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understanding, "explained" the receipt to his client, and supposed, when the facts were fresh in his memory, that "Grumley knew all about it." The fact of this explanation is also new and significant, coming as it did from a party who understood the settlement to embrace everything. Upon the controlling point of the case which so hung in doubt, does not this new evidence throw light? To my mind it greatly contributes to remove the obscurity of the transaction, and in connection with the conduct of the parties and the other evidence, it gives a significance to the general language of the receipt in harmony with its terms. Against all this, against the positive testimony of Mr. Krum and Mr. Webb, given now as before, against the understanding of Mr. Grumley's counsel, his acts in making the settlement, dismissing the suit, explaining the receipt to his client, the apparent abandonment of the case by the latter, and against the general equities of the case as they now appear, we are required to assume as truth the unsupported recollection of Mr. Grumley, and because of a former finding! If the last record presents nothing new, I was greatly deceived as to the former one.

Second. A new and further ground is now urged in support of the motion, that if the settlement covered the suit then pending for the value of the buildings, it did not embrace the plaintiff's claim upon the leasehold. In other words, Mr. Grumley's counsel present him in the attitude of prosecuting a claim to recover the value of the improvements upon the premises, consisting entirely of buildings; and having succeeded in that, now seeking to recover back the buildings themselves, in their improved condition, in a suit for the leasehold. The remarkable prosperity of the city, with the repairs and fitting up of the buildings, may have so enhanced the value of the leasehold as to make it now an object of pursuit. But the claim will not avail him, both because of its inherent vice, and because the whole matter of the lease was covered by the settlement.

In the decision of this cause it was held that the general words of the receipt were broad enough, unless otherwise understood, to embrace and discharge not only the second suit, but "all causes of action then existing in favor of the plaintiff against the defend-

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ants, whether joint or several," and that such was their effect, so far as any claims pertain to or grow out of the lease. The point now made was not overlooked, though the argument of counsel and the language of the court was directed almost entirely to the pending suit. But the settlement between Messrs. Broadhead and Krum, as they state it, not only included the second suit, but "the whole thing." Mr. Broadhead testified that "Judge Krum insisted upon a settlement of the whole thing. I am confident of that; I yielded to that." And Mr. Krum testifies that Grumley recognized the settlement as including "the whole controversy about this property," and that the parties, as he understood them to say, "had come to a settlement of all their difficulties." That Mr. Broadhead here details the facts as they actually occurred is not denied; that he explained to Grumley the receipt evidencing this sweeping settlement is not denied; that he was therein frank and faithful to his client is not questioned; yet it is still insisted upon that Grumley was left in the dark as to the true character of the settlement, and that, too, in face of the fact that he read and signed a receipt which declared in express terms, and in language to which men usually attach but one meaning, that the \$6,500 was accepted as a full satisfaction of all claims and demands then had or held against the defendant.

But I will not pursue the subject further. The sweeping words of the receipt harmonize perfectly with the sweeping character of the settlement, and it is perfectly evident that the parties intended a settlement which should embrace everything, and leave nothing respecting the leasehold for future adjustment. To disturb such a settlement at this late day, in the view of a majority of the court, would be to take a step which there is nothing in the record to justify.

With the concurrence of Judge Currier, the motion is overruled. Judge Wagner dissents.

WAGNER, Judge, dissenting.

A motion for a rehearing was filed in this case and has been overruled by a majority of the court. As reasons for that action

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it is again reiterated that the case is essentially different from what it was when the record was in this court before, and that new and important evidence has developed the fact and made it perfectly clear that the settlement entered into between Grumley and Webb, by which the former received \$6,500 for his judgment, was a final adjustment of everything between the parties, and effectually precludes Grumley from the further prosecution of this suit. But this assumption rests on mere assertion. A few detached and fragmentary sentences are wrested from the context in the evidence, and, thus contorted, are sought to uphold and sustain this view. As stated in the previous dissenting opinion in this case, I claim that all the material evidence is substantially the same in both cases. It would be a just and legitimate mode, in the determination of a controversy like this, for those who assert the existence of certain facts to show those facts by the record; but such a course has not been pursued, and I apprehend if it had been attempted it would have proved a sheer failure. The facts mainly hinge upon the testimony of two witnesses, Krum and Broadhead. They were the attorneys, and it was principally through their instrumentality that the compromise in reference to the first judgment was brought about. Grumley, it may be said, is an interested party, and his evidence may be regarded only so far as it is borne out and corroborated by the surrounding facts and circumstances. As for Webb, his course and conduct in this whole matter has been such as to show that he is utterly unworthy of credit.

I have compared the testimony of Broadhead and Krum on all the material parts, as taken on both trials, and here insert the same in parallel columns.

TESTIMONY OF BROADHEAD ON FIRST TRIAL.

"Was attorney for Grumley in the \$7,000 against Webb, and also in the suit of Grumley v. Bigham, Webb & Pond. There was judgment in the last suit for \$11,500. I was satisfied the judgment was too large.

"After the judgment was obtained there was a negotiation for its settlement between myself and Judge Krum,

TESTIMONY OF BROADHEAD ON SECOND TRIAL.

"Recollect the suit of Grumley v. Bigham, Webb & Pond, in which the judgment of \$11,000 was recovered. I was counsel for Grumley. Was his counsel also in the \$7,000 suit. Recollect the negotiations for settlement. Negotiations were entered into to settle the case between Judge Krum and myself.

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and finally we agreed on a compromise on March 7, 1865, and settled for the amount paid.

"The negotiation was with regard to this judgment of \$11,500. This \$7,000 suit against Webb alone did not engage my attention much, for I had pretty much abandoned all hope of recovering the judgment obtained. The settlement was finally made at my office, but the negotiations were had at Krum's. I signed the order of dismissal of the \$7,000 suit. Grumley signed the other two papers relating to the judgment.

"I got these papers (the receipts) from Judge Krum. He drew them up in conformity with agreements which he and I had. Judge Krum gave me a check for \$6,500. My understanding was that this settled the whole suit between the parties. Grumley gave me no special authority to dismiss the \$7,000 suit. Grumley never gave me any authority to dismiss that \$7,000 suit. I dismissed it on my own responsibility. I had no authority to settle that suit. My understanding was that it was included in the settlement. My understanding was that the settlement included all pending matters of controversy between the parties. Think that Grumley signed the papers at my office.

"Cannot recollect that Judge Krum came to my office with Grumley with the papers, nor can I say that Grumley was present when I got the check from Judge Krum. I cannot say that I took out my fees in any other cases than the one where we had judgment. Grumley went, shortly after the settlement, to Memphis, in the beginning of 1865, and wrote to me repeatedly to go on with this \$7,000 suit. He spoke to me when he came back here afterward about this \$7,000 suit, and it seemed to be his idea that the suit was still pending. I do not recollect ever speaking

"I saw the judgment was too large.

* * * * *

"I think we were entitled to between \$8,000 and \$9,000. * * * Judge Krum thought we were entitled to about \$5,000. The \$5,000 and \$8,000 were the amounts that divided us. The matter was finally adjusted for \$6,500. I called on Grumley at Third and Washington avenue on the morning of the settlement. I think it was after Judge Krum and myself had agreed upon the \$6,500. I am not positive whether he had agreed or whether I saw him there to get him to agree to it. At any rate I had made up my mind to settle at \$6,500. Judge Krum and myself, I think, had come together at those figures. The most distinct matter that I recollect of in regard to the settlement is the fact that I settled the amount with Grumley in my office and paid him over the money.

"I settled with Grumley at my office. *None present but myself and himself*; Mr. Sharp was in the office and may be Mr. Haeussler was in the office. I recollect distinctly of calling to see Grumley on Third and Washington avenue, but what about I do not recollect now; I think it was to urge him to make a settlement.

"Do not recollect where I settled with Judge Krum, but my impression is that Judge Krum gave me the check at his office. I have been thinking about that a good deal, and that is my best impression. There was no one present but him and myself. *That I am very positive about.*

"I am quite sure Grumley was not present when Judge Krum and myself had any talk about this matter. Do not recollect whether the receipt was given first or the check, or whether they were both given at the same time.

"Grumley signed the receipt in my office. I am quite sure no one was

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to Grumley about settling the \$7,000 suit. Judge Krum and I contended for different amounts. There was an error in the judgment. It was for too much. Judge Krum insisted the error should reduce the judgment to \$5,000, and I stuck at \$7,000, may be \$8,000 or \$9,000. I advised Grumley to take \$7,000. We finally agreed on \$6,500. After Grumley came back from Memphis he insisted on the \$7,000 suit going on; seemed not to know that it had been dismissed. *I never told him that it was, or that the costs had been paid.*

"Saw Grumley at Third and Washington avenue, where he was clerking, on the morning of the settlement, and made an appointment with him to meet me. He came to my office by appointment to settle with me. I am quite sure there was no one with Grumley when he came to settle with me. I don't think Grumley was present when I got the papers from Judge Krum. Grumley was not present at any time when Webb or Krum was present.

"When I saw Grumley the day of the settlement, at Third and Washington avenue, I did not yet have the papers. I got them from Judge Krum afterward.

"Grumley never saw the order of dismissal of the \$7,000 suit. I am sure he did not."

present when Grumley and I had any settlement about this matter.

"Do not recollect whether Judge Krum gave me the order for dismissal at the same time he gave me the other papers. *I do not think Grumley ever saw the order of dismissal.*

"Do not recollect whether I saw Grumley at his store the day of the settlement. Recollect I saw him at the clothing store, but can't say whether the settlement was made that day or the day after. My best recollection is that it was made the same day. Grumley came to my office, I believe, the same day I saw him in his store, but can't say how he got the information that I had the money for him. I went to see Grumley that day, because, although he had authorized me to settle the matter, I would not take the responsibility of settling for any man without his consent, although Judge Krum and myself had agreed upon the settlement. In what manner exactly the papers passed through my hands, I don't know. I saw Judge Krum repeatedly about this matter. Judge Krum wanted the settlement should include both cases. The main matter in my mind was the judgment. Judge Krum wanted to include the other suit. I had not much faith in the other suit. Don't know whether the settlement was to include the other suit, from the fact that the other suit was to be dismissed. I inferred that it was to be dismissed by agreement. *I don't think I was authorized to settle anything but the judgment.* Don't recollect that I ever told Grumley that the suit was dismissed at or about the time of the settlement. My impression was that Grumley knew about it. I have no distinct recollection of telling him about it until his return from Memphis. * * * My impression is that I charged Grumley a fee only in the case in which judgment had

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been obtained. * * * My understanding was that the settlement was to cover both suits.

"My impression about the matter is that Judge Krum and I had agreed on \$6,500, and I went to Grumley to see whether he would agree to it, and then the papers were drawn up. That is my impression merely. I got the papers; got them from Judge Krum, I think; think Judge Krum gave me the check. I have no recollection of any one being present when Judge Krum and I had anything to do with this case. No one was with Grumley when he came to my office on the day of the settlement. I don't know of Grumley's ever taking the matter into his own hands at all. If he did, I did not know it. I don't recollect of Judge Krum ever telling me that he had settled with Grumley. If there was any negotiation between the parties, I never heard of it. *Don't know that Grumley was aware that I was settling the \$7,000 suit, and that Webb was to pay the costs. Had I told Grumley to take \$3,000 for his judgment, I am satisfied he would have done it. The judgment is the only thing I recollect talking to Grumley about. I can not give any satisfactory explanation of how I came to settle the \$7,000 suit.*"

I will now in like manner refer to the testimony of Krum:

TESTIMONY OF KRUM ON FIRST TRIAL.

"I was present when the terms of the settlement which led to the execution of these papers were discussed. Both parties were present. I drew these papers while Webb and Grumley were sitting by my table in my office.

"Webb remarked something to this effect: 'Well! we have now come to a settlement;' and stated the amount that he agreed to pay, and that was \$6,500. He was to pay \$6,500 to settle the whole controversy, in respect to the whole of those leasehold premises.

TESTIMONY OF KRUM ON SECOND TRIAL.

"Know the parties. Was counsel for Webb in a suit brought by Grumley against Bigbam, Webb & Pond; and also in another suit against Webb alone. I attended personally to both suits.

"Know of attempts to compromise after decree of \$11,522. Webb authorized me to make a settlement of the whole matter in regard to the leasehold premises. I attempted to do that; consulted Mr. Broadhead. Mr. Broadhead was attorney for Grum-

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The settlement covered both suits. Webb was to pay the costs in both cases, and the pending suit of \$7,000 was to be dismissed, and I was instructed to draw the papers accordingly. I stated: 'Now, I understand this to be a full settlement of the whole controversy,' and Webb and Grumley I understood to assent to it. I then wrote those two papers—that is, the receipt for \$3,500, and this direction to the clerk of the court to enter satisfaction of the \$11,000 judgment on the record; and also this memorandum dismissing this \$7,000 suit, and read them in the presence of both parties. Webb had a check for the amount of \$6,500. Went with Grumley to Broadhead, at Broadhead's office. Webb paid costs in both cases. Do not know whether I saw Grumley sign the receipt or not.

"Mr. Broadhead is mistaken, as he and I did not close the controversy. At the time of that settlement, the only matters of controversy were the matters involved in the two suits, that is to say, the judgment of \$11,522.54, and the pending \$7,000 suit; but I understood that this was a settlement of all controversies between the parties. I drew up the two papers signed by Grumley, and the one signed by Sharp & Broadhead. Sharp & Broadhead signed the order of dismissal. I may have had them sign it because I may have thought the clerk of the court would not know Grumley's signature. The clerk of the court would have known Grumley's signature to that as well as to the paper directing the entry of satisfaction of the judgment. I do not know why I did not have Grumley himself sign that order directing the dismissal of the \$7,000 suit. The \$7,000 suit was included in that settlement, and was to be dismissed. That I am positive of; as sure of it as of anything."

ley. We did not arrive at any adjustment.

"One morning, after I had had my last interview with Mr. Broadhead, Webb and Grumley came to my office. They took a seat near my table and had a conversation, and then turned round and stated the object of their call.

"Webb said: 'We have at last come to a settlement of all our difficulties.'

"Webb stated the amount he was to pay, and one of the two said that Webb was to pay the costs of both suits, and they desired me to draw up the necessary papers. As I was about to do so, I said: 'Now, gentlemen, I understand that this is a settlement of the whole controversy about this property between you,' and I understood them to assent to it.

"When they assented, I then turned round to my desk and wrote these papers, or rather *two of them*."

[Papers here read in evidence and set out in *hæc verba*.]

"I allude to the one, the satisfaction in discharge of all claims, dated March 7, 1865, and the one acknowledging satisfaction of the judgment. I have marked the three papers A, B and C. I read A and B in the presence of both parties. * * * I won't undertake to say whether I read this at the same time—that is, the order of dismissal. Perhaps I did. If I wrote that there I read that to them also. Think I wrote that at my office. After I had read these papers, Mr. Webb handed me his check for the amount, \$6,500, and requested me to see what the costs would be. That was in the presence of Grumley. These two papers were signed and given to Grumley. Grumley and I then went over to Broadhead's office. Mr. Broadhead had requested me to have the funds pass through his hands. The order of dismissal was signed at the same time

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by Sharp and Broadhead, I think. Am quite sure Grumley was present when I passed over the check. Think I proposed to Broadhead on the part of Webb to pay \$5,000. Broadhead and myself both agreed there were errors in the decree of \$11,522.54. We differed perhaps \$1,000 or \$2,000. Broadhead and myself never concluded anything.

"It seems to me I had seen Webb and Grumley together in regard to this settlement, previous to the time above stated, when they came to my office. I might have got the impression from the fact that I had been informed that they had been talking together.

"I drew up the three papers A, B and C in my office; think I read them to Grumley. I think I am certain about that. My conviction is very clear upon that point.

"I am quite positive that I read the three papers to Grumley there at my office. I think I did. The paper marked C is signed by the firm name of Sharp & Broadhead. The signature was written by Mr. Broadhead. I had Mr. Broadhead sign that order of dismissal because I thought the clerk of the court might not know Grumley's signature if he signed it; therefore I had it signed by Sharp & Broadhead, so that the clerk of the court would dismiss the \$7,000 suit. I suppose the clerk of the court would have known Grumley's signature to that as well as to the other. I can give no reason other than the one just given why I had Grumley sign two of these papers, and Sharp & Broadhead the order of dismissal."

The above constitutes the material portions of the testimony of both Broadhead and Krum, taken at the first and second trials. An examination of it shows most conclusively that there is really no difference. In substance and sense it is precisely the same. Some paragraphs are changed so as to stand in different order

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in the arrangement, and the phraseology in some instances is changed; but it would puzzle the most acute and refined intellect to point out any real difference in substance. To talk about harmonizing the evidence of these two witnesses is simply ridiculous and absurd. In essential parts they flatly and squarely contradict each other. The truth is, the matter was faded and dim in their minds, and they had different impressions. But one thing is abundantly apparent, and that is that Broadhead had no authority to compromise and dismiss the \$7,000 suit, and that Grumley was wholly ignorant that any arrangement had been made respecting it until after his return from Memphis, many months subsequent. Broadhead unequivocally disclaims any authority from Grumley to compromise this suit for \$7,000, but has an impression that it was to be dismissed. If the judgment and suit were both included in the settlement, why was not the order for the dismissal, as well as the other two papers, signed by Grumley? When they want a receipt that will bind Grumley, and an order for entering satisfaction on the record, then his signature is procured; but the order of dismissal is strangely and unaccountably withheld from him. It would not do to say that the clerk would not know his signature, for the clerk would know it as well in the one case as in the other. The parties were willing to risk his signature in the matter of the receipt and the entry of satisfaction on the record. Why not risk it also to the order of dismissal if that came within the terms of the agreement? No attempt has been made to answer this question, and I imagine it would be found very difficult to answer. Broadhead says that he cannot give any satisfactory explanation of how he came to settle the second suit; and Krum says he cannot give any satisfactory explanation of how it happened that Sharp & Broadhead signed the order of dismissal, instead of Grumley. In these statements I am of the opinion that they are both correct. This examination of the evidence, in connection with my prior dissenting opinion, must suffice. One of the concurring judges, to evade the statute of frauds, uses this language: "One who sells his equitable interest in land, receives the consideration and *yields possession*, will not be permitted to say afterward that the assignment was not in

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writing; or, if the holder of the equity surrenders to him who has the legal title, accepts the consideration and *gives possession*, the contract is executed, his equity is dead, and no court of equity could enforce it." I readily admit that this is the law, but it has no application to this case.

The transfer of possession, which is necessary to take it out of the statute, is wholly wanting. The mere payment of the purchase money does not take the case out of the operation of the statute, and there is not one particle of evidence to show that Grumley ever delivered possession to Webb in pursuance of this pretended agreement. Webb's possession was wrongful, and Grumley never acquiesced in it. The record is entirely barren to support the proposition of law above enunciated.

Again, if we admit for the sake of the argument that the \$7,000 suit was compromised, it in nowise bars Grumley from recovering in this suit. That suit and the present one are totally different as respects the subject-matter. That was purely for personalty, this is for realty. The \$7,000 suit set up a right in Grumley to remove the buildings before January 1, 1864, and alleged that Webb refused to allow their removal after January 1, 1864, thereby damaging him \$7,000; and a demurrer had been sustained to the petition. The action was founded on the supposition that the buildings were mere personal property, and Webb's refusal to allow them to be removed amounted to a conversion. Nothing was said about the interest in the leasehold, nor was it thought of at the time. The sale of some old buildings was never intended to carry with it a valuable interest in lands. The buildings are not co-extensive with the lease, but are simply incident to it, and the sale or conversion of the buildings would not convey the interest in the lease. This suit is now for the equitable interest in the lease, and it has no identity with the \$7,000 suit, which it is alleged was settled, but which I wholly deny.

My conclusion on the whole case is that the decision was wrong, and that a rehearing should be granted.

SEPARATE OPINION OF JUDGE CURRIER.

I have examined this case with care, and have already fully expressed my views upon it. I have now re-examined it, but find no occasion to recall, modify or explain the views and positions previously taken, or for a further prolongation of the general discussion. Justice to the court and the cause, however, demands that some notice should be taken of the remarkable dissenting opinion filed under this motion.

That opinion starts out with the proposition that the disputed facts "mainly hinge upon the testimony of two witnesses, Krum and Broadhead." It then undertakes to set out and display the testimony of these witnesses *in extenso* in "all its material parts." It is the grave inaccuracy of these recitals of the evidence that chiefly requires attention.

The scope of the settlement and Grumley's knowledge of it were the vital facts submitted for investigation. Was the settlement sweeping, including all causes of difference? Did Grumley know of its real character? These were the questions to be considered and decided. Now, the dissenting opinion, instead of stating, omits and totally ignores the most material parts of Broadhead's testimony that bears directly upon these issues. I think the same omissions will be found in the statement and brief of plaintiff's counsel.

Broadhead not only testified that Krum "wanted" to include the second suit, and that he "understood" it to be included, but he says, with emphasis, that the second suit was in fact included, and that Krum *insisted* upon having it so. He says: "JUDGE KRUM INSISTED UPON A SETTLEMENT OF THE WHOLE THING. I AM CONFIDENT OF THAT. I YIELDED TO THAT." Again he testifies that he explained to Grumley the receipt evidencing this sweeping settlement, reducing it to a moral certainty that Grumley was apprised of its true character. All this evidence is dropped out of what is represented to be "all the material parts" of Broadhead's testimony. It would have been quite as accurate to have presented the part left out, and then held that up as being all that was material. It is not the number of words a witness uses

that renders his testimony important, but the number and character of the facts he discloses.

In the decision of this cause, a majority of the court deduced from the evidence the following propositions or conclusions of fact, to-wit:

"1. Col. Broadhead was the authorized and fully trusted representative of the plaintiff in his negotiations for a settlement. He was of the opinion, as he testifies, that Grumley would have settled for \$3,000 had he advised it.

"2. In these negotiations Broadhead came to a clear and definite understanding with the counsel of the opposite party that the settlement should include both suits. That was *insisted* upon and he yielded to the demand.

"3. It therefore appears that the plaintiff's counsel, Col. Broadhead, knew that the settlement was understood to include the second as well as the first suit, and that it was understood by himself and the opposite party to be embraced in the receipt.

"4. Thus knowing and understanding the facts of the settlement, he expounded the receipt to his client. If the exposition was a fair one — and the contrary is not pretended — Grumley was thereby advised of the scope of the settlement and the import of the receipt as the same were understood by Broadhead and the opposite party. In a word, he was made to "know all about it," and Broadhead testifies, as we have seen, that he supposed at the time that such was the fact.

"5. This matter is not left to inference alone. Grumley's knowledge is shown affirmatively by the testimony of Judge Krum. I find it to be true, as testified by this witness, that Grumley was in the witness's office on the day of the settlement in company with Webb, and that he there recognized the settlement as including the subject-matter of both suits.

"6. Grumley's subsequent conduct accords with this view, and is inconsistent with the notion that he believed the second suit was left to be fought out in the courts. He gave it no attention thenceforward for nearly a year and a half, or at least not enough attention, according to his own swearing, to ascertain that it had

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been dismissed, untill it had been out of court nearly eighteen months.

"7. The settlement, assuming it to have embraced both suits, was still fair and reasonable. The evidence shows that the \$6,500 paid by Webb was a full equivalent for the balance due on the rent account, and for the value of the houses sued for in the second suit."

It has been insisted that Broadhead's authority to negotiate, mentioned in the first proposition, was limited to the judgment, and an effort has been made to explain away the force of the facts recited in the sixth proposition. Otherwise than this, no definite and tangible objection has been taken to the soundness of any one of the propositions above recited. All else is indefinite, vague, uncertain—a violent general assault, without attacking anything specific except personal character.

The second, third and fourth propositions rest mainly upon the testimony of Col. Broadhead. That testimony is fully set out in the record, but not a word of it can be found in the recitals of evidence contained in the dissenting opinion.

The second, third, fourth and seventh propositions rest mainly upon new evidence—that is, evidence contained in the present record which was not in the first. Whether it requires any remarkable mental acumen to distinguish the one record from the other I do not care to discuss.

There occurs in my former opinion this statement: "It is an entire mistake to suppose that there is any serious conflict between Judge Krum and Col. Broadhead. They differ as to details, but they agree perfectly as to the substance of the settlement—that it was to include both suits." I desire to reiterate and re-affirm the entire accuracy of this statement. There is nothing in the evidence at variance with it.

The fifth proposition above recited rests mainly upon Judge Krum, and it is the only one of the seven propositions that depends upon his testimony in the *slightest degree*. On this issue the great struggle in the case has been TO BREAK DOWN JUDGE KRUM, so as to destroy the evidence on which this proposition rests. It is with that view that a desperate effort is made

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to keep up the idea of an irreconcilable antagonism between him and Col. Broadhead. But Broadhead does not contradict the evidence on which the fifth proposition is based.

He was not present and knew nothing, and did not claim to know anything, of the occurrences in Krum's office on the 7th of March, 1865, to which Krum testifies. The attempt to array Broadhead against Krum on *that point* is a total failure. Failing in that, the fifth proposition must stand. That being sustained, it would be of no avail to the plaintiff if the remaining six were decided in his favor.

I concur in overruling the motion.

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1. *Attachment—Non-residence—Evidence.*—Upon an issue made by a plea in abatement, in an attachment suit grounded upon alleged non-residence, evidence showing merely that defendant owned property in another State is incompetent, and is properly excluded, unless peculiar circumstances rendering the evidence admissible be first shown to exist.—*Gould v. Smith*, 43.

2. *Practice, civil—Answer—New matter—Allegations, sufficiency of—Replication.*—In a suit on an attachment bond the petition averred generally that plaintiff in the attachment had failed to prosecute his action without delay and with effect; and further, that a judgment had been rendered for defendant in the transaction on a plea in abatement.

Held, that an allegation in the answer that the attachment suit was still pending on a motion for new trial, and undisposed of, set up no new matter requiring a replication.

In general, any fact which plaintiff is bound to prove in the first instance to sustain his action, is not new matter. In the case supposed, plaintiff, in order to show that defendant had failed to prosecute his action without delay

ATTACHMENT—(Continued.)

and with effect, was bound to prove that the attachment suit had been finally disposed of.—State, to use of Demuth, v. Williams, 210.

3. *Attachment, general judgment in—Fieri facias not absolutely void.*—The attachment act of 1825 (R. S. 1825, p. 144 *et seq.*) contemplated a general judgment in attachment suits. But under its provisions, the attached property alone was to be taken on execution. However, a general *fieri facias* on such a judgment would not be absolutely void. It would furnish the sheriff with sufficient authority to levy it upon the property attached.—Cabell v. Grubbs, 353.

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AUDITOR, STATE.

1. *Mandamus—Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.—State ex rel. Vail v. Draper, 213.
2. *Officer in by right cannot be ousted by action of governor—Party claiming must resort to quo warranto—Payment, how made by State auditor in case of contest.*—After an officer has received his commission, has been inducted into office, and is in by color of title, he cannot be ousted by the action of the governor, as by the appointment of another in his place. The party claiming the office in such case must resort to *quo warranto*. In making payments under such circumstances, the State auditor is bound to take notice that the incumbent is an officer *de facto*, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.—*Id.*

B

BILLS AND NOTES.

1. *Bills and notes—Consideration, sufficiency of.*—Where a promissory note is made in consideration of the assignment, by the payee to the maker, of a contract, and the maker of the note derived under such assignment all the advantages which could flow from a valid and operative assignment, the consideration is sufficient for the note, although the assignor may have had no assignable interest in the contract so as legally to be able to transfer the same.—Hudson v. Busby, 35.
2. *Bills and notes—Indorsers and joint makers distinguished.*—A. drew a bill of exchange upon B., requesting B. to pay to A. (the drawer), or order, the amount of the bill. A. subsequently indorsed it, and, to secure negotiation of the bill, induced C. to add his signature on the back of the bill after A.'s own indorsement. B. subsequently honored the bill, and afterward brought suit against C. for the amount of the bill, as for money paid out at C.'s request. *Held*, that C. was not a joint maker. The bill was payable to the order of the drawer, and the drawer first indorsed it, and then it was indorsed by C., and not till then. He was palpably an indorsee as well as an indorser, and could not be charged in such an action.—Rickey v. Dameron, 61.
3. *Bills and notes—Protest, notice of—What sufficient.*—When the notary making a protest knows the residence of all the indorsers, he may at once send

BILLS AND NOTES—(Continued.)

the notice of protest to each one individually, when they will all be holden in the order of their indorsements. But the holder is not supposed to know any of the parties except the one who has indorsed the paper to him, and each one is supposed to know the one from whom he has received it. The contract is direct and the relation is immediate between each indorser and his immediate indorsee, and the notice is sufficient if it comes to each indorser from such indorsee as soon as he is advised of the protest; nor does the rule vary although the parties live in different cities. The holder is only required to notify the one who indorsed to him, unless he desires to hold other parties who might escape responsibility if not notified in their turn; nor is there any difference if the last indorsement is for collection merely.—*Griffith v. Assman*, 66.

4. *Bills and notes—Days of grace—Protest—Sunday.*—Where there are no days of grace it has been generally held that when a note, by its terms, became due upon a Sunday, it was payable the following Monday. But there never was any question that in ordinary commercial paper entitled to grace, if the last of the three days is Sunday or other great holiday, the holder should make demand upon the secular day next preceding, and, upon non-payment, should at once protest the paper.—*Kuntz v. Tempel*, 71.

5. *Bills and notes, parties to—Indorsers—Joint makers.*—If a promissory note be negotiable in form, and made so in fact by the indorsement of the payee, then all other indorsers, unless the contrary is stipulated, are held as such; but if the note is not negotiable, or be not indorsed by the payee, then, in the absence of an express agreement, the original indorsers are to be treated as makers.—*Id.*

6. *Bills and notes—Indorsers in blank—Nature of their liability may be shown by parol testimony.*—When a name is placed upon a note in blank, it is competent to explain the intention and purpose of him who placed it there; and it is proper for the court to hear evidence and decide as to the circumstances and intention. Explanation is not necessarily contradiction; and if the appearance of the paper is consistent with either of two states of facts or intentions, evidence explaining its appearance or showing the intention is admissible. The law only implies a particular undertaking in the absence of an actual one, and when the latter is shown there is no room for the former.—*Id.*

7. *Contracts—Bills and notes—Husband and wife—Survivorship.*—Where certain promissory notes, given for rent of land which was the separate estate of a married woman, were made payable to the order of her husband and herself, they were not payable, therefore, to the husband alone, nor were the rents payable to him on the strength of such notes, as his wife's appointee. But these notes were neither real estate nor personal chattels in possession, but choses in action, and the joint payee took them by survivorship.—*Shields v. Stillman*, 82.

8. *Bills of exchange and promissory notes—Payee indorsing without recourse, who re-acquires after maturity, subject to antecedent equities.*—The payee of a promissory note, who re-acquires it after indorsing it over without recourse, then stands in the position of an ordinary transferee. And where the note is re-acquired after maturity, he takes it like any other assignee of non-negotiable paper, subject to all antecedent equities. And

BILLS AND NOTES—(Continued.)

his rights are not enlarged by the fact that he claims as payee, and not as transferee or indorsee. Thus, where the makers and indorsers of a note were firms having a common member, the assignee after maturity, of the indorser, could not at law sue the makers, even though he had previously been payee of the note, and claimed as such.—*Calhoun v. Albin*, 304.

9. *Surety — Notice by to sue, when not in writing, is no protection to.*—Notice by a surety on a note to the holder thereof to sue, when not in writing, is not binding upon the holder, either under the statute (Gen. Stat. 1865, p. 406, § 1; Wagn. Stat. 1302, § 1) or at common law; and his neglect to comply with such notice will not release the surety.—*Langdon v. Markle*, 357.
10. *Promissory note based on contract, suit on — Recoupment.*—Where a note grows out of a contract and is executed in pursuance of its stipulations, any questions of recoupment between parties to the note should be treated as though the suit had been on the original contract itself.—*Id.*
11. *Promissory notes — Guaranty — Notice not necessary to render guarantor liable, when.*—The words "I assign the within note to A. for value received, and guaranty its prompt and full payment," indorsed by the payee on the back of the note, impose upon the assignor an absolute obligation to pay, and no demand or notice of the maker's default is necessary to render him liable.—*Wright v. Dyer*, 525.

BOATMEN'S SAVINGS INSTITUTION.

See **USURY**, 1.

BONDS, COUNTY.

1. *Equity — County Court, bonds given by for building of county road — Injunction to restrain issue of.*—A bill in equity will not lie to enjoin the assessment, levy and collection of a tax for the purpose of paying bonds given by a County Court for the construction of a county road, as a complete remedy exists at law.—*Steines v. Franklin County*, 167.
2. *County roads — County Courts cannot give bonds for without submitting matter to popular election — Such bonds may be validated in what manner — Construction of statute.*—Section 13 of the act of February 16, 1865, concerning roads and highways (Sess. Acts 1865, p. 120), declared among other things as follows: "Before any expenditures shall be made by County Courts for the purpose contemplated by this act, the County Courts may, for the purpose of information, submit the amount of the proposed expenditures to the votes of the respective counties; * * * and if a majority of the voters shall approve of such proposed appropriation, the court may proceed and improve the roads." * * * Under this act the County Court of Franklin county had no right to proceed of its own motion, without submitting the question to the voters of the county, to give county bonds for the building of a county road.

When the rights of third persons are involved, or the public good requires it, the word *may*, used in a law, should always be construed to mean *shall*.—*Id.*

See **PETTIS COUNTY WARRANTS**; **RAILROADS**, 1, 2, 6.

BONDS, OFFICIAL.

See **EXECUTIONS**, 2, 3; **SECRETARY OF STATE**, 1.

BOUNDARIES.

See **LANDS AND LAND TITLES**, 2.

C

CAIRO & FULTON RAILROAD.

See RAILROADS, 11.

CIRCUIT ATTORNEYS.

See PRACTICE, CRIMINAL, 2.

CONSTABLES.

1. *Constable, collections by—Statute of limitations begins to run, when.—*

The cause of action against a constable for failing to account for moneys collected by him, does not accrue so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties, or until the officer has made a proper return or report showing that the money had been realized.—*Kirk v. Sportsman*, 383.

See EXECUTIONS, 1, 2, 3.

CONSTITUTION OF MISSOURI.

1. *Constitution, what acts under shall be declared invalid.—*The Supreme Court of this State will never declare an act of the Legislature invalid unless in their judgment its nullity and invalidity are placed beyond a reasonable doubt. It is presumed that they are constitutional unless they manifestly infringe on some of the provisions of the constitution.—*State ex rel. Circuit Attorney v. Cape Girardeau & State Line R.R. Co.*, 468.

2. *Constitution—Special legislation—Amendments to laws passed under old constitution.—*The act of December 31, 1859, incorporating the Cape Girardeau & State Line Railroad, was not void under article IV, § 27, of the present constitution, as being an act of special legislation. That clause was obviously intended to have a prospective operation, and to apply only to laws passed after the adoption of the constitution. And the amendment of February 18, 1869, permitting the company to build the road to the State line through or near Bloomfield, was valid under section 3, article XI, of the constitution, which section empowered the Legislature to make subsequent amendments to charters already in operation.—*Id.*

CONTINUANCES.

See PRACTICE, CIVIL—PLEADING, 4.

CONTRACTS.

1. *Insurance, fire, contract of—What acts essential to.—*The rule of law now is that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient.—*Lungstrass v. German Ins. Co.*, 201.

2. *Contracts—Unlawful consideration—Money may be recovered back, when.—*Money paid out to be used in efforts to procure pardon for a criminal may be recovered where it appears the efforts were not made and the agreement was unexecuted. The rule that money paid for an unlawful consideration cannot be recovered back applies to executed and not to executory contracts.—*Adams Express Co. v. Reno*, 264.

CONTRACTS—(Continued.)

3. *Letter of credit — Loan, notice of — Approval and acceptance — Ratification, effect of.*—If, after a loan is made by a bank on a letter of credit, the writer has information thereof, and with full knowledge approves of and assents to the loan, such approval and assent amount to a ratification, and he will be bound thereby.—*Central Savings Bank v. Shine*, 456.
4. *Guaranty, offer of — Notice of acceptance necessary to bind guarantor — What notice reasonable as to time a question for the jury.*—Where an offer or proposal is made by letter to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance, in order that the guarantor may know distinctly his liability, and may have the means of arranging his relations with his principal, and may take from him security or indemnity.
In an action against the guarantor, a general averment of notice of acceptance by plaintiff is sufficient, and the question whether it be reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court.—*Id.*
5. *Contracts with old and infirm persons, where relation of trust exists, presumed to be void.*—Where one stands in relations of trust and confidence with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party.—*Cadwallader v. West*, 488.
6. *Contract to convey land — Suit to recover purchase money — Parol contract cannot be substituted for written one.*—In consideration of a certain payment, one made his written agreement to convey a tract of land on receipt of a deed therefor from the State. Failing to receive it, the least he could do was to pay back the purchase money.
The contract indicated an expectation of receiving such a deed in a reasonable time; and in suit to recover back the money it would not be admissible for defendant to show that the purchaser never expected a deed, but only desired possession of the land to enable him to carry away a quantity of timber. This would be, in effect, substituting another and a different contract by parol in the place of the written one.—*Langford v. Caldwell*, 508.
7. *Contracts — Specific performance — Action on parol contract of sale by coparcener — Proof, what essential.*—In action for specific performance of a parol agreement for the sale of real estate, where plaintiff claimed to have gone into possession under the agreement, but was theretofore already in constructive possession, it should appear that after the agreement, acts were done with the privity of the owner of the fee which were inconsistent with the previous holding, and such as to clearly indicate a change in the relations of the parties. And so in an action of this sort by one formerly a coparcener in the land, evidence showing that after the agreement the other coparcener had abandoned his claim; that plaintiff held adversely to him and made valuable and lasting improvements, not expected from his relation to his coparcener, would be important in making out his case.

In such suits the contract should be established by competent proof, and be clear, definite and unequivocal in all its terms. And the declaration even of living parties in regard to it should be cautiously received, much more so

CONTRACTS—(Continued.)

those of parties deceased. To be entitled to weight, the latter should receive other support.—*Underwood v. Underwood*, 527.

See **BILLS AND NOTES; BONDS, COUNTY; BONDS, OFFICIAL; CONVEYANCES; CORPORATIONS, 4; EJECTMENT, 1; FRAUDULENT CONVEYANCES; INSURANCE, FIRE; LANDLORD AND TENANT, 4; PARTNERSHIP, 1, 2, 4; PETTIS COUNTY WARRANTS; ST. LOUIS, CITY OF, 1.**

CONVEYANCES.

1. *Conveyances—Sheriff's deed—Amended deed should be made, when—Effect of amendment on former deed—Innocent purchasers, who are.*—It is the right and duty of a sheriff to amend a defective deed when the facts will warrant him in so doing, and the amended deed will relate back to the date of the original one.

In such case the former deed may be first set aside on motion. But the last and correct deed is not void because the imperfect deed was not first set aside.

A purchaser of the land between the date of the first and second deeds will be affected by the latter only where he had either actual notice of the facts therein recited, or notice of such recorded proceedings as would advise him of them.

Where A. purchased at sheriff's sale and went into open, notorious possession of the premises, of which fact B. was aware, but, learning that the title was defective by reason of infirmities in the sheriff's deed, proceeded to bid off the property under another judgment for a nominal sum, to say that B., in such a case, was a stranger, and should be protected as an innocent purchaser from the operation of a second and amended sheriff's deed to A., would confound all ideas as to what constitutes innocence either in an actual or moral sense.—*Thornton v. Miskimmon*, 219.

2. *Conveyances—Covenants, when merely personal.*—Although a deed on its face purports to be made by A., B. and C., "trustees," yet if the covenants of grant, bargain and sale and those of warranty are therein averred to be simply by "the parties of the first part," without further description, the covenants will be held to be merely personal.—*Murphy v. Price*, 247.
3. *Conveyances—Covenants for seizin and quiet enjoyment, how broken.*—The covenants of indefeasible seizin contained in the words "grant, bargain and sell" would be nominally broken in all cases where there was a paramount title, even though the grantee took possession. But where the holder of such title is in possession so as to exclude the grantee, the latter is entitled to full damages, i. e. the purchase money and interest. So with covenant of warranty.—*Id.*

When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment will be held to be broken without any other act on the part of the grantee or the claimant.

In such cases it is not necessary, in order to recover on those covenants, to prove actual eviction.—*Id.*

4. *Estoppel in pais—Pointing out of wrong lines by grantor—Sale of property, erection of building, etc.*—Where the grantor of certain real estate showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money

CONVEYANCES—(Continued.)

- expended, he thereby directly led the purchaser into a line of conduct prejudicial to his interest, and should not afterward be heard alleging anything to the contrary. Such acts would constitute an estoppel *in pais*.—Rutherford v. Tracy, 325.
5. *Conveyances — Description by lot should prevail over that by courses and distances.*—Where the granting clause of a deed designated the property conveyed as "lot number 3 in block 87," of a certain town, and afterward described it by metes and bounds which embraced an area less than the lot, the legal inference or presumption was that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the number of the lot had the same effect as that of a fixed monument, and prevailed over an inconsistent description by courses and distances, there being nothing to show that the grantor designed to reserve or carve out any part of the lot. Had the grantor in his deed used any apt or appropriate words showing that it was not his intention to convey the whole lot, effect should be given to them and that, without regard to any mere verbal position they might occupy in the deed.—*Id.*
 6. *Conveyances — Acknowledgment, defective, what.*—A certificate of acknowledgment which omits the word "acknowledged," and contains no word or words expressive of an equivalent idea, is fatally defective.—Cabell v. Grubbs, 353.
 7. *Conveyances — Sheriff's deed, defective acknowledgment of — Not aided by record.*—The record of a certificate of acknowledgment to a sheriff's deed, made by the clerk of a Circuit Court (Wagn. Stat. 612 § 56), is inadmissible to sustain an original acknowledgment thereof, where the latter was defective.—Samuels v. Shelton, 444.
 8. *Conveyances — Acknowledgment — Clerical error.*—A certificate of acknowledgment indorsed on the back of a sheriff's deed is not invalid because it recited that "he appeared in court and acknowledged that he executed and delivered a deed for the uses," etc., and did not specifically refer to the deed acknowledged. No material or necessary part of the certificate was omitted, and the intention was sufficiently clear on the face of the paper.—*Id.*
 9. *Conveyances — Seal — Scrawl sufficient.*—In a sheriff's deed, a scrawl appended to his name, with the word "seal" written therein, is, under the laws of this State, a sufficient seal.—*Id.*
 10. *Sheriff's deed prima facie evidence of the truth of its recitals.*—Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are *prima facie* evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts. But the recitals may be invalidated or destroyed by the party resisting the deed.—*Id.*
 11. *Conveyance — Acknowledgment of by deputy sheriff in his own name invalid.*—An acknowledgment to a deed, of land sold under execution, made by a deputy sheriff in his own name, is invalid.—*Id.*
 12. *Deeds — Adequacy of consideration — Courts will not look into, except where inadequacy is coupled with mental imbecility.*—Courts look into the adequacy of consideration only under peculiar circumstances, as where one

CONVEYANCES—(Continued.)

of the parties to a contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness, or other cause. In such cases courts of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if two facts concur, viz: inadequacy of consideration and mental imbecility, although the weakness of the mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence.—*Cadwallader v. West*, 483.

13. *Equity — Deed — Consideration — Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Id.*
14. *Conveyances — Undue influence, what — Proof of.*—In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the donor is, from age or weakness of disposition, likely to be imposed on, the statement of a consideration where there was none, or improvidence in the transaction, are circumstances which furnish a probable, though not always a certain, test of undue influence or fraud.—*Id.*

See **CONTRACTS**, 6; **EQUITY**, 4; **FRAUDS, STATUTE OF**; **FRAUDULENT CONVEYANCES**; **LANDS AND LAND TITLES**, 2, 5; **PRACTICE, CIVIL—PLEADING**, 14; **SHERIFFS' SALES**, 2.

CORPORATIONS.

1. *Corporations, officers of—Statements by, admissibility of as evidence—Res gestæ.*—Statements by an officer of a corporation, made while he was acting in the course of his official relations, with regard to the then existing state of affairs, become a part of the *res gestæ*, and are clearly admissible as evidence.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Corporations, officers of—Loan by, of money of the corporation without authority—Responsibility of sureties.*—When an officer of a corporation loans money of the corporation without authority, and has failed to account for it, his sureties are liable thereupon, whether the persons to whom he loaned it are solvent or not.—*Id.*
3. *Corporations, powers of—Liability of agents—Sureties.*—A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power; and therefore a surety for one as agent for a corporation is limited to such acts as the corporation is authorized to require of its agents. But where the corporation grants powers "to buy, exchange, sell, mortgage, transfer, or otherwise use its property," under these powers it might legally loan out its surplus funds, and the right to accept security for such loan follows as a necessary incident; and where gold was deposited with a corporation as collateral security for a loan, the title thereto vested lawfully in the corporation; and where an agent of the corporation converted such gold to his own use, his sureties are liable therefor.—*Id.*
4. *Corporations—Officers, bonds of—Variation in style of office.*—Where an official bond of an officer of a corporation was given for the faithful performance of his duties as treasurer, and the charter designates the officer as "secretary, who shall act as treasurer," *held*, that the sureties on its bond were liable for defalcations which occurred while he was acting as treasurer.—*Id.*

CORPORATIONS—(Continued.)

5. *Corporations — Stock, transfer of title to — Surrender of certificate of stock.*—Although the purchaser of stock in an incorporated company may insist, as a condition precedent to the purchase of the stock, that the certificate be surrendered to the company for cancellation, yet where no such condition was insisted on, and the transfer was in fact made on the books of the company, such assignment would be sufficient without surrender of the certificate to pass the title to the stock.—*Boatmen's Insurance and Trust Co. v. Able*, 136.
6. *Corporations — Railroad — Dissolution — Act to foreclose the State's lien.*—A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its right.—*Moore v. Whitcomb*, 543.
See RAILROADS.

COSTS.

See PRACTICE, CIVIL — APPEAL, 4, 6, 7; PRACTICE, CRIMINAL, 2.

COUNTIES.

1. *County, liability of for expense of guarding prisoner — Change of venue — Failure of county to build jail.*—Where a prisoner indicted for a felony in one county is removed by change of venue to another, not provided with a sufficient jail, the former county is not liable for the expenses of guarding the prisoner in the latter, when the cost arose from a failure of the county to provide such jail. The county failing to provide the jail must bear the expense. (See *Wagn. Stat.* 787, §§ 19, 20.)—*Ransom v. Gentry County*, 341.
2. *County, suit by to collect money — Payment may be made to plaintiff's attorney without special authority given him to institute suit.*—In suit by a county for the collection of money, payment may be made by defendant to the lawfully authorized agent and attorney of the county, without proof of any special authority conferred upon the attorney to institute the suit. He was warranted in receiving the money sued for as in other cases.—*Carroll County v. Cheatham*, 385.

See BONDS, COUNTY; COURTS, COUNTY; PETTIS COUNTY WARRANTS; RAILROADS, 1, 2, 6; REGISTRATION, 1.

COURTS, CLERKS OF.

See OFFICERS, 3; PRACTICE, SUPREME COURT, 1.

COURTS, COUNTY.

1. *County Courts, justices of — Term of office — Districting of counties, effect of.*—Section 1 of chapter 137, *Gen. Stat.* 1865 (*Wagn. Stat.* 439), provides that each county, where the court is composed of three justices, may be districted by the County Court into three districts, and each district shall elect and be entitled to one of the justices of the court. Section 2 provides that the term of office shall be six years, and section 3 provides that at the election in 1866 there shall be elected three justices, one of whom shall vacate his office in two, one in four, and one in six years, to be determined by lot, and thereafter there shall be one justice elected every two years. Pursuant to these provisions, in 1866 three justices were elected for Macon county, who proceeded to draw lots and determine their respective terms of office.

COURTS, COUNTY—(Continued.)

Subsequently the court divided the county into three districts, assigning one of the justices to each district. *Held*, that this order districting the county did not vacate the offices of the several judges, but they were entitled to hold their offices until the remainder of the respective terms.—*State ex rel. Attorney-General v. Gilbreath*, 107.

2. *Prohibition, application for writ of against County Court—When court acts in ministerial capacity, refused.*—When it appears from the pleadings, in an application for a writ of prohibition against a County Court, that the proceedings which the petitioners seek to restrain belong exclusively to the administrative and ministerial duties of that court, and do not involve any exercise of the jurisdiction of the court in its judicial capacity, the application will be refused. (*West v. Clark County Court*, 41 Mo. 44, affirmed.)—*Hockaday v. Newsom*, 196.

See ADMINISTRATION, 2; COURTS, PROBATE; SWAMP LANDS, 2, 3.

COURTS, PROBATE.

1. *Courts, Probate—Sale of lands, report of at same term—Impeachment of—Writ of error.*—In case of a sale of land under an order of Probate Court, the title does not pass until the report of the sale and its approval. The proceedings are a nullity, and no title passes if the report is made and the sale approved at the term when the order issued. But in proceedings before the Circuit Court the rule is different. And notwithstanding such premature report, the title will pass until the sale be set aside on appeal, or by direct proceedings instituted for that purpose. The reason for the distinction is based on the fact that where the report is approved in advance of its lawful return, the action of the Circuit Court can, and that of the Probate Court cannot, be reviewed by writ of error.—*State ex rel. Perry v. Towl*, 148.

See ADMINISTRATION; COURTS, COUNTY; WILLS.

CRIMES AND PUNISHMENTS.

1. *Criminal law—Embezzlement—Agency—Purchase of land with title in abeyance.*—An agent who converts to his own use money intrusted to him by his principal for the purchase of land, is guilty of embezzlement. And the case is not altered by reason of the fact that the land contracted for proved to be in litigation, and that the title was for that cause in abeyance.—*State v. Healy*, 531.

See PRACTICE, CRIMINAL.

CRIMINAL LAW.

See PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages—Libel—Justification—Close of case, who entitled to.*—When defendants in an action for libel plead justification, that plea does not entitle them to open and close the case. Where, as in such case, the damages are unliquidated, and to be computed by a jury and depend upon proof, the plaintiff is generally entitled to open.—*Buckley v. Knapp*, 152.

DAMAGES—(Continued.)

2. *Damages — Libel — Justification — Want of knowledge of publication of libel.*— Under the statute touching libel (Wagn. Stat. 1021, § 44), defendant may allege both the truth of the matter charged as defamatory and any circumstances in mitigation. But when the defendant bases his whole defense on the truth of the matter charged, testimony showing that the libelous article was published without his knowledge is inadmissible.—*Id.*
3. *Damages — Libel — Newspaper proprietor, responsibility of.*—The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it.—*Id.*
4. *Damages — Malice, express and implied.*—When slanderous words are spoken, or a libelous article is published falsely, the law will imply malice. There is no necessity of proving express malice.—*Id.*
5. *Damages — Libel, vindictive damages allowed in.*—Vindictive damages may be allowed in civil proceedings. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender.—*Id.*
6. *Damages — Libel — Wealth of defendant may be shown in estimating damages.*—In an action for libel, evidence may be properly introduced to show defendant's wealth as an element in estimating the damages.—*Id.*
7. *Corporations — Railroads — Damages for failure to fence, when plaintiff contracts with company to fence.*—One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground for action of damages for killing of stock, even though the statute makes it imperative on the company to fence.—*Ellis v. Pacific R.R. Co.*, 231.
8. *Damages — Officers, liability of, for torts of employees — Allegations in action for — What averments necessary.*—A warden or inspector of the State penitentiary will not be liable in damages for the torts of a convict, on the mere averment that they carelessly and negligently suffered the convict to go at large, whereby the injury resulted, etc. Under the statute (Wagn. Stat. 983-5, §§ 2, 5, 6, 17, 25) it was discretionary with the officers to determine how and in what manner convicts employed outside of the penitentiary should be suffered to go at large. And officers acting in a discretionary capacity will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty.—*Schoettgen v. Wilson*, 253.

See EXECUTIONS, 3; INJUNCTION, 1, 2; PRACTICE, SUPREME COURT, 2;
RAILROADS, 5, 7, 8, 9, 12.

DECISIONS OF SUPREME COURT.

See PRACTICE, SUPREME COURT, 13.

DEDICATION TO PUBLIC USE.

1. *Estoppel — Park — Land dedicated for common, cannot be diverted to other use, when*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (Wagn. Stat. 1328, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." Held, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees

DEDICATION TO PUBLIC USE—(Continued.)

of the town from diverting the property from its original use and the purpose specified by the donor in the act of dedication, by causing public streets to be run through it.

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

DESCENTS AND DISTRIBUTIONS.

See **WILLS**, 4.

DOWER.

1. *Dower — Ejectment — Merger, doctrine of, when applicable.*—Before the assignment of a widow's dower, ejectment will lie on her behalf for the dwelling-house, messuage, etc., of which her husband died seized. (Wagn. Stat. 542, § 21.) And her right will not be defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that the widow is heir to the reversion. Her dower estate in such case will not merge in the reversion, for the doctrine of merger applies only where the less and greater estates come together without any intervening estate.—*Miller v. Talley*, 503.

See **JUDGMENTS**, 5; **LANDS AND LAND TITLES**, 9.

E**EJECTMENT.**

1. *Ejectment, by vendor against vendee — Latter must show payment of purchase money.*—When a party goes into possession under a contract of purchase, and makes default, he is liable to be turned out in an action of ejectment. And in such action by the vendor against the vendee, the latter can only defend his possession by showing a performance of the contract on his part, and that he is not in default.—*Gibbs v. Sullens*, 237.
2. *Dower — Ejectment — Merger, doctrine of, when applicable.*—Before the assignment of a widow's dower, ejectment will lie on her behalf for the dwelling-house, messuage, etc., of which her husband died seized. (Wagn. Stat. 542, § 21.) And her right will not be defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that the widow is heir to the reversion. Her dower estate in such case will not merge in the reversion, for the doctrine of merger applies only where the less and greater estates come together without any intervening estate.—*Miller v. Talley*, 503.

See **LANDS AND LAND TITLES**, 4.

EMBEZZLEMENT.

See **CRIMES AND PUNISHMENTS**, 1.

EMINENT DOMAIN.

1. *Eminent domain — Appropriation of property for local schools constitutional.*—An appropriation of property for the use of a local school (see Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327, 328, §§ 3, 4) is an appropriation of it to a public use, within the meaning of section 16, article 1, of the State constitution.—*Township Board of Education v. Hackmann*, 243.

EQUITY.

1. *Equity — Fraudulent conveyances — Sufficiency of consideration.*—A., being the owner of certain land which he occupied jointly with B., sold said land

EQUITY—(Continued.)

in 1861 to C. for \$2,500, and received C.'s notes for the purchase money, secured by deed of trust on the property. On the 12th of February, 1866, some three or four days before a judgment of \$1,200 was rendered against him, A., notwithstanding the conveyance to C., executed a lease of the land to B. for six years, at a rent of \$1,200 for the term, the receipt of which was acknowledged the same day. On the 5th of July, 1866, A. purchased in the name of B. twenty acres of ground from D. and his wife and her trustee, for a nominal consideration of \$2,300, and, in connection with this purchase, transferred the notes and deed of trust from C., then amounting to some \$3,000, to D. or his wife, by her trustee. D. and his wife, in addition to the conveyance of the land, paid \$500 cash, and the half-interest in a growing crop of tobacco on the premises, that interest being valued at \$450. At the same time the lease above mentioned from A. to B. was turned over to D. and his wife, or one of them. D. subsequently enforced the payment of C.'s note by sale under the deed of trust, and purchased the property for himself. *Held*, that the assignment of the notes and deed of trust must be regarded as the consideration paid for the twenty acres; that the lease assigned, being from one who had no title to the property leased, was of no value, and could not constitute a good consideration for such purchase, and therefore the consideration passed from A.; and under such circumstances the land so purchased in B.'s name will be held to be vested in B. as a secret trustee for A., and to be liable to the demands of A.'s creditors.—*Kehr v. Sichler*, 96.

2. *Equity — Husband and wife — Trustee — Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—*Walter v. Walter*, 140.
3. *Husband and wife — Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate provision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*
4. *Equity — Action to reform deed — Mistake in description of land in mortgage — Judgment liens — Relief.*—When a deed of trust by mistake omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land, obtained by a creditor with notice, after the first but before the second deed. But such action of the court can only be justified when the mistake clearly appears. No necessity can arise for a re-sale of the property

EQUITY—(Continued.)

where the evidence fails to show that it was sacrificed in consequence of the cloud thrown on the title by the judgment and sale.

Equity may not only enforce liens but remove them when they come in conflict with a superior equity.—*Young v. Cason*, 259.

5. *Chancery—Jury—Issues of fact, submission of to a jury.*—In chancery cases it is better for the court to try the whole case than to submit issues of fact to the jury. But under the statute such issues may, in a proper case, be so submitted. And the exercise of the discretion is not ground for error unless the party has plainly been injured by it. But the court is not bound by the finding, as it would be by a verdict at law. It may adopt it or not, in its discretion.—*Burt v. Rynex*, 309.

6. *Practice, civil—Supreme Court—Chancery—Instructions.*—In purely chancery proceedings, instructions given or refused below are disregarded by the Supreme Court.—*Pixlee v. Walker*, 313.

7. *Equity—Judgment lien not essential to plaintiff's equity.*—Plaintiff in a judgment at law may procure the aid of a court of equity in order to charge the property of defendant, without first securing a judgment lien against it. Although such lien is usually an incident, it is not essential to his equity. (*Glenny v. Freeman*, 44 Mo. 518, affirmed.)—*Alnut v. Leper*, 319.

8. *Equity can be resorted to only after legal remedies have been exhausted.*—Ordinary legal remedies must be shown to have been exhausted to entitle one to his remedy in equity.—*Id.*

9. *Notice sufficient to put one on inquiry sufficient.*—Notice sufficient to put one upon inquiry as to the existence of a right or title, is in law presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right notwithstanding the exercise of due diligence.—*Rhodes v. Outcalt*, 367.

10. *Mortgages and deeds of trust—Mistake in description—Grantee treated in equity as purchaser of land intended to be conveyed—Rights of purchaser having knowledge of mistake—What facts sufficient to put upon inquiry.*—A. owned city property designated as "lots 10, 11 and 12, in block 7." He made a deed of trust intending to convey the same, but, by mistake, the land described in the deed was lots of corresponding numbers in block 6, wherein he owned no real estate.

Held, 1st, that notwithstanding said false description, the grantee in equity actually secured a lien on the property intended to be conveyed; and not a lien merely, but his rights were such that he would be regarded in the light of an actual purchaser. The debtor was bound in conscience to correct the mistake. And his obligation to correct it was such an equity as would bind his heirs, voluntary grantees and purchasers with notice. 2d, that where a creditor of A. subsequently had the land in block 7 sold under a judgment against A., and bought it in—knowing, at the time, of the deed of trust, and of the fact that A. owned the property sold, and not that in block 6—the purchaser had knowledge sufficient to put him on careful and diligent inquiry as to the rights of the grantee in the deed of trust, and that he bought subject to the lien of that deed.—*Id.*

11. *Equity—Title bond—Deed of trust, sale under after death of grantor—Purchase at by wife—Equity of wife, etc.*—B. gave to M. a title bond to certain land, and the wife of M., from her own estate, made partial payment

EQUITY—(Continued.)

- of the purchase money, and added valuable improvements to the land. Afterward M. gave B. a trust deed on his equity in the property to secure the payment of the balance of the purchase money, remainder over to his wife. After M.'s death the lots were sold under the deed of trust to satisfy the unpaid notes, and most of them were bid in by the wife for herself, with her own means, at a price sufficient to pay the notes. B. then executed a deed for the whole to the heirs of M. Suit was brought against the widow by the purchaser at the administrator's sale of the interest of M. in the property, for the title thereto. *Held*, that it was properly dismissed, because, first, if the deed from B. conveyed his title it went to the heirs of M., and the judgment against the widow could only cut off her equity; second, as against her there was no equity. All the money that went for the purchase and improvement of the property belonged to her; and when M. conveyed his equity in trust for the payment of the purchase money, remainder to his wife, it was not a settlement in fraud of creditors, but a simple act of justice, and did not create a resulting trust in their favor.—*Buckner v. Stine*, 407.
12. *Assignment—Fraud cannot be inferred from merely because assignor was in debt.*—Fraud cannot be inferred from the transfer of property merely because the maker of the deed was at the time in debt.—*Id.*
13. *Equity—Notice—Lis pendens.*—The pendency of a suit is not such notice to one not served with process, and not appearing, that a decree therein will bind him.—*Samuels v. Shelton*, 444.
14. *Equity—Deed—Consideration—Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Cadwallader v. West*, 483.
15. *Equity—Statute of frauds—Accord and satisfaction.—Receipt—Action barred by.*—A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds (*Wagn. Stat.* 655, § 2), is evidence of an accord and satisfaction; and, when coupled with the payment of money, would bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt.—*Grumley v. Webb*, 562.
16. *Equity—Statute of frauds—Part performance—Payment—Possession—Vendor cannot invoke the aid of equity, when.*—Even where a parol contract is in the nature of a purchase, and so embraced in the purview of the statute of frauds, if the purchase money is paid and the purchaser is in possession and holds a perfect record title, the vendor cannot invoke the active interposition of a court of equity to recover the property. Such a claim is inequitable and unconscionable, and has no equity which a court of equity will touch.—*Id.*
17. *Contract—Receipt embraces what matters—Construed, how.*—A receipt given in satisfaction of a judgment and "all claims and demands" does not, on its face, include matters not embraced in the judgment. But the receipt must be interpreted and construed from existing facts and in the light of surrounding and cotemporary circumstances. (*Grumley v. Webb*, 44 Mo. 456.) And if the parties to the receipt clearly and manifestly intended to include in

EQUITY—(Continued.)

it other claims besides the judgment, courts will interpret the contract accordingly.—*Id.*

18. *Equity—Statute of frauds—Performance—What acts take case out of—Estoppel.*—An unexecuted agreement for the sale or surrender of an equity may not, under the statute of frauds (Wagn. Stat. 655, § 2), be enforced. But if the holder of an equitable claim receives money in payment for the same from one who has the legal title and the possession, gives him a receipt and discharge, and leaves him in quiet enjoyment of the property—does all) all things, in short, which could be done in the settlement of his claim—he cannot afterward invoke the statute and say that his discharge was not in writing. His contract is executed, his equity is dead, and he is estopped by his own conduct from further urging his claim. In such case, the possession prior to the settlement having been adverse to the claimant, his subsequent acquiescence in it would have far greater significance than if possession were rightful or held under claimant.—*Id.*

19. *Equity—Statute of frauds—Divestiture of equitable title must be in writing.*—A voluntary divestiture of an equitable estate by the owner, for a valuable consideration, is in the nature of a conveyance of his title by bargain and sale, and under the statute of frauds (Wagn. Stat. 655, § 2) cannot be proved by parol testimony. This proposition of law is sustained by the decision in *Hughes v. Moore*, 7 Cranch, 176. The case at bar is not one executed by possession and turning on part performance.—*Grumley v. Webb* (per *Wagner, J.*, dissenting), 562.

20. *Equity—Statute of frauds—Release proved, how.*—A release is not by act or operation of law, but by the act of the party releasing; and therefore the act can be proved only by a deed or conveyance in writing.—*Id.*

21. *Equity—Legal and equitable transfers.*—No difference in principle can exist between the transfer of a legal and that of an equitable estate.—*Id.*

See **CONTRACTS**, 5; **CONVEYANCES**, 12, 14; **COURTS**, COUNTY, 2; **HUSBAND AND WIFE**; **INJUNCTION**; **PARTNERSHIP**, 1; **PARTITION**.

ESTOPPEL.

1. *Estoppel in pais—Pointing out of wrong lines by grantor—Sale of property, erection of building, etc.*—Where the grantor of certain real estate showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money expended, he thereby directly led the purchaser into a line of conduct prejudicial to his interest, and should not afterward be heard alleging anything to the contrary. Such acts would constitute an estoppel in pais.—*Rutherford v. Tracy*, 325.

2. *Estoppel—Park—Land dedicated for common, cannot be diverted to other use, when.*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (Wagn. Stat. 1328, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." *Held*, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees of the town from diverting the property from its original use and the pur-

ESTOPPEL—(Continued.)

pose specified by the donor in the act of dedication, by causing public streets to be run through it.

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

See **EQUITY**, 18.

EVIDENCE.

1. *Corporations, officers of—Statements by, admissibility of as evidence—Res gestæ.*—Statements by an officer of a corporation, made while he was acting in the course of his official relations, with regard to the then existing state of affairs, become a part of the *res gestæ*, and are clearly admissible as evidence.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Attachment—Non-residence—Evidence.*—Upon an issue made by a plea in abatement, in an attachment suit grounded upon alleged non-residence, evidence showing merely that defendant owned property in another State is incompetent, and is properly excluded, unless peculiar circumstances rendering the evidence admissible be first shown to exist.—*Gould v. Smith*, 43.
3. *Practice, civil—Appeal—Supreme Court will not weigh evidence in law cases.*—The Supreme Court will not look into evidence or pass upon its weight in law cases, even where the case was tried by the court below without the aid of a jury.—*Id.*
4. *Evidence—Objections to, must be brought distinctly to the attention of the court at the time.*—Objections to the admission in evidence of a paper, on the ground that it had not been placed on file a certain number of days before the trial, as required by the statute, should be made at the time the evidence is offered, and should distinctly allege the grounds of objection. Trials are to be conducted in good faith, and objections of mere form are to be brought distinctly to the attention of the court, or they should be considered as waived.—*Kuntz v. Tempel*, 71.
5. *Bills and notes—Indorsers in blank—Nature of their liability may be shown by parol testimony.*—When a name is placed upon a note in blank, it is competent to explain the intention and purpose of him who placed it there; and it is proper for the court to hear evidence and decide as to the circumstances and intention. Explanation is not necessarily contradiction; and if the appearance of the paper is consistent with either of two states of facts or intentions, evidence explaining its appearance or showing the intention is admissible. The law only implies a particular undertaking in the absence of an actual one, and when the latter is shown there is no room for the former.—*Id.*
6. *Evidence, formal objections to, insufficient.*—Objections to evidence which are merely formal, specifying no reasons therefor, are uniformly held to be insufficient.—*Buckley v. Knapp*, 152.
7. *Records, lost, ordinarily may be proved by parol evidence.*—Ordinarily, if a record be lost, its contents may be proved, like any other document, by secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence.—*Foult v. Colburn*, 225.
8. *Will, suit to contest validity of—Wife may testify in.*—In an action to contest the validity of a will, the wife is not precluded from testifying by

EVIDENCE—(Continued.)

reason of anything contained in the statute concerning witnesses (Wagn. Stat. 1372-3, §§ 1-5). That act contemplates cases where the husband is the real party in interest; whereas, in the case supposed, the wife is the real and the husband merely a nominal party.—*Tingley v. Cowgill*, 291.

9. *Witnesses—Medical men cannot give opinions as to the merits of a cause.*—Medical men, when called as scientific witnesses, cannot give their opinions as to the merits of a cause, but their opinions must be predicated upon the facts proved. Where, however, the facts are doubtful, they may be asked their opinions upon a case hypothetically stated.—*Id.*

10. *Evidence—Hearsay—Declarations of persons since deceased.*—The declarations of persons since deceased, against their interest at the time the declarations were made, constitute an exception to the rule excluding hearsay evidence. But to render them admissible it should appear that the deceased knew the facts, or that it was his duty to know them; that his declarations were at variance with his interest at the time they were made. The weight of such testimony is a matter to be determined by the jury.—*Wynn v. Cory*, 346.

See **CONTRACTS**, 7; **LANDLORD AND TENANT**, 2; **PRACTICE, CIVIL—PLEADING**, 6, 8, 14; **PRACTICE, CIVIL—TRIALS**, 5, 6; **PRACTICE, CRIMINAL**, 4, 7, 8; **SHERIFFS' SALES**, 3, 6.

EXECUTIONS.

1. *Executions—Constable—Agency—Sale.*—A constable, having an execution, levied on goods belonging to the debtor, which were being sold at auction. After a conference between the constable, the defendant and the auctioneer, the auctioneer in the constable's presence announced that the matter had been adjusted; that he would proceed with the sale and pay over to the constable sufficient of the proceeds to satisfy the execution. Accordingly the sale proceeded and plaintiff bought goods, for which he paid the auctioneer, and the auctioneer turned the money over to the constable. The constable then produced another execution, hitherto undisclosed, and levied upon the property bought by plaintiff and carried it away. *Held*, that the constable had made the auctioneer his agent in making the sale, and that by subsequently taking possession of the property he disaffirmed the sale and was bound to return the purchase money.—*Thurley v. O'Connell*, 27.

2. *Execution—Constable's bond, action on—Judgment on which execution was based must be proved.*—In suit on a constable's bond for failure to make levy on an execution, defendant cannot call in question the regularity of the judgment on which the execution was founded, but plaintiff must prove that the judgment was rendered.—*State, to use of Liechter, v. Miller*, 251.

3. *Execution—Constable's bond—Action on for failure to levy—Measure of damages.*—In an action on a constable's bond for failure to make a levy on an execution, the measure of damages would be the amount of complainant's actual injury resulting from the negligence or misconduct of the constable, and not the amount called for by the face of the execution.—*Id.*

4. *Attachment, general judgment in—Fieri facias not absolutely void.*—The attachment act of 1825 (R. S. 1825, p. 144 *et seq.*) contemplated a general judgment in attachment suits. But under its provisions, the attached property alone was to be taken on execution. However, a general *fieri facias* on such a judgment would not be absolutely void. It would furnish the

EXECUTIONS—(Continued.)

- sheriff with sufficient authority to levy it upon the property attached.—*Cabell v. Grubbs*, 353.
5. *Execution sale—Where execution is regular on its face, purchaser cannot be affected, unless the execution is rendered void by the irregularities.*—Every reasonable intendment should be made in support of the rights of a purchaser at an execution sale. Where an execution is regular on its face, he cannot be injuriously affected by any irregularities in the proceedings which resulted in the sale, unless they were of a character to render the proceedings wholly void. He certainly cannot in any collateral proceeding.—*Id.*
 6. *Execution—Motion to quash—Parties.*—Whether any except parties to a record are entitled to submit a motion to quash an execution, questioned.—*Fiske v. Lamoreaux*, 523.
 7. *Execution—Judgment, assignment of—Money paid in purchase of.*—Where the amount due on a judgment is paid by a third party as consideration for its assignment and not in satisfaction of it, the assignee may sue out an execution on the judgment.—*Id.*

F**FALSE PRETENSES.**

See PRACTICE, CRIMINAL, 6.

FENCES.

See RAILROADS, 3, 4, 5, 7, 8; UNLAWFUL DETAINER, 1.

FOREIGN JUDGMENTS.

See JUDGMENTS, 1.

FORGERY.

See PRACTICE, CRIMINAL, 14.

FRANKLIN COUNTY.

See BONDS, COUNTY, 1, 2.

FRAUDS.

1. *Fraud—Sale of land—Mere inadequacy of consideration not sufficient to charge fraud.*—Mere inadequacy of consideration in the sale of property, of itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for the interference of equity.—*Carter v. Abshire*, 300.
2. *Deed of trust—Surplus, payment of—Creditor, claim of to surplus by reason of purchase of land and notes.*—A trustee in a deed of trust cannot refuse to pay over to one who has purchased the encumbered property subject to the trust, any surplus after satisfying the trust notes, on the ground that the purchase was without consideration and a fraud upon creditors. Until set aside in a direct action by the creditors, such sale will stand, and strangers will not be permitted to prove the fraud. And he cannot refuse so to pay over the surplus on the ground that the purchaser at the trust sale had already become the owner of the land and the assignee of the notes, and thus claimed to be entitled to the money. The rights of the creditor cannot be passed upon in this collateral manner.—*Reid v. Mullins*, 344.
3. *Contracts with old and infirm persons, where relation of trust exists, presumed to be void.*—Where one stands in relations of trust and confidence

FRAUDS—(Continued.)

with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party.—*Cadwallader v. West*, 483.

4. *Deeds—Adequacy of consideration—Courts will not look into, except where inadequacy is coupled with mental imbecility.*—Courts look into the adequacy of consideration only under peculiar circumstances, as where one of the parties to a contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness, or other cause. In such cases courts of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if two facts concur, viz: inadequacy of consideration and mental imbecility, although the weakness of the mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence.—*Id.*
5. *Equity—Deed—Consideration—Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Id.*
6. *Conveyances—Undue influence, what—Proof of.*—In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the donor is, from age or weakness of disposition, likely to be imposed on, the statement of a consideration where there was none, or improvidence in the transaction, are circumstances which furnish a probable, though not always a certain, test of undue influence or fraud.—*Id.*
7. *Trusts and trustees—Trustee's sale—Fraud, proof touching—What insufficient.*—The fact that property was sold by a trustee for a sum less than half its value, and was shortly afterward sold back to him by the purchaser for the same amount, is not sufficient of itself to fix on the trustee the charge of having speculated at the sale in violation of his duty. To that end there should be some proof of an understanding between him and the bidder at or prior to the sale.—*Boehlert v. McBride*, 505.

See EQUITY, 12; PRACTICE, CRIMINAL, 3.

FRAUDS, STATUTE OF.

1. *Equity—Statute of frauds—Accord and satisfaction—Receipt—Action barred by.*—A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds (*Wagn. Stat.* 655, § 2), is evidence of an accord and satisfaction; and, when coupled with the payment of money, would bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt.—*Grunley v. Webb*, 562.
2. *Equity—Statute of frauds—Part performance—Payment—Possession—Vendor cannot invoke the aid of equity, when.*—Even where a parol contract is in the nature of a purchase, and so embraced in the purview of the statute of frauds, if the purchase money is paid and the purchaser is in possession and holds a perfect record title, the vendor cannot invoke the active interposition of a court of equity to recover the property. Such a claim is inequitable and unconscionable, and has no equity which a court of equity will touch.—*Id.*

FRAUDS, STATUTE OF—(Continued.)

8. *Equity—Statute of frauds—What acts take case out of—Performance—Estoppel.*—An unexecuted agreement for the sale or surrender of an equity may not, under the statute of frauds (Wagn. Stat. 655, § 2), be enforced. But if the holder of an equitable claim receives money in payment for the same from one who has the legal title and the possession, gives him a receipt and discharge, and leaves him in quiet enjoyment of the property—does all things, in short, which could be done in the settlement of his claim—he cannot afterward invoke the statute and say that his discharge was not in writing. His contract is executed. His equity is dead.—*Id.*
4. *Equity—Statute of frauds—Divestiture of equitable title must be in writing.*—A voluntary divestiture of an equitable estate by the owner, for a valuable consideration, is in the nature of a conveyance of his title by bargain and sale, and, under the statute of frauds (Wagn. Stat. 655, § 2), cannot be proved by parol testimony. This proposition of law is sustained by the decision in *Hughes v. Moore*, 7 Cranch, 176. The case at bar is not one executed by possession and turning on part performance.—*Id.* (per Wagner, J., dissenting).
5. *Equity—Statute of frauds—Release proved, how.*—A release is not by act or operation of law, but by the act of the party releasing; and therefore the act can be proved only by a deed or conveyance in writing.—*Id.*
6. *Statute of frauds—Sale by parol—Transfer of possession—Payment of purchase money.*—Where an equitable estate is sold by parol, a transfer of possession is essential to take it out of the statute of frauds. The mere payment of the purchase money will not have that effect.—*Id.* 599.

FRAUDULENT CONVEYANCES.

1. *Equity—Fraudulent conveyances—Sufficiency of consideration.*—A., being the owner of certain land which he occupied jointly with B., sold said land in 1861 to C. for \$2,500, and received C.'s notes for the purchase money, secured by deed of trust on the property. On the 12th of February, 1866, some three or four days before a judgment of \$1,200 was rendered against him, A., notwithstanding the conveyance to C., executed a lease of the land to B. for six years, at a rent of \$1,200 for the term, the receipt of which was acknowledged the same day. On the 5th of July, 1866, A. purchased in the name of B. twenty acres of ground from D. and his wife and her trustee, for a nominal consideration of \$2,300, and, in connection with this purchase, transferred the notes and deed of trust from C., then amounting to some \$3,000, to D. or his wife, by her trustee. D. and his wife, in addition to the conveyance of the land, paid \$500 cash, and the half-interest in a growing crop of tobacco on the premises, that interest being valued at \$450. At the same time the lease above mentioned from A. to B. was turned over to D. and his wife, or one of them. D. subsequently enforced the payment of C.'s note by sale under the deed of trust, and purchased the property for himself. *Held*, that the assignment of the notes and deed of trust must be regarded as the consideration paid for the twenty acres; that the lease assigned, being from one who had no title to the property leased, was of no value, and could not constitute a good consideration for such purchase, and therefore the consideration passed from A.; and under such circumstances the land so purchased in B.'s name will be held to be vested in B. as a secret trustee for A., and to be liable to the demands of A.'s creditors.—*Kehr v. Sichler*, 96.

FRAUDULENT CONVEYANCES—(Continued.)

2. *Husband and wife—Fraudulent conveyances—Purchase in the name of the wife, out of the property of her insolvent husband, creates a trust in favor of the husband's creditors.*—Where property is conveyed to a married woman as a cover to enable her husband to hold and enjoy the property through her as his own, if it is shown that the purchase money was in fact paid by him, or that the credit was given to him, the wife should be held to have taken the property in her name for his use, and a trust would result to him for the benefit of his creditors.—*McLaran v. Mead*, 115.
3. *Husband and wife—Fraudulent conveyances—Purchase of property with money raised by a pledge of wife's property, or on credit given to her, does not create a resulting trust for her husband's creditors.*—Where property is purchased in the name of a married woman, with money raised on a note made by her, secured by a pledge of her own property, or by credit given to her on the faith of such a pledge, and not to her husband, and if she designed to purchase for herself, with her own means, and with no fraudulent intent, the fact that the husband signed the note with her and has a marital interest in her property does not create a resulting trust in favor of his creditors. When a married woman is not dealing with her sole and separate estate, so that it becomes necessary that some one else should be a party to the note given to make it valid, and that her husband should join in the deed of trust, the mere fact of such joinder by the husband is not a badge of fraud, but something more should appear—as that the credit was given to the husband, or that he has paid or arranged to pay, in whole or in part, out of his own means.—*Id.*

G**GARNISHMENT.**

1. *Garnishment—Wages, payment of.*—A garnishee will not be chargeable for payment of monthly wages to his employee after garnishment, the payments having been made so as to keep the amount due the employee below the value of his services for the thirty days preceding the several payments. (See *Wagn. Stat.* 664, § 37.)—*Davis v. Meredith*, 263.

See **PRACTICE, CIVIL—PLEADING**, 4.

GOVERNOR.

See **OFFICERS**, 2.

GUARANTY.

1. *Guaranty, offer of—Notice of acceptance necessary to bind guarantor.*—*What notice reasonable as to time a question for the jury.*—Where an offer or proposal is made by letter to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance, in order that the guarantor may know distinctly his liability, and may have the means of arranging his relations with his principal, and may take from him security or indemnity.

In an action against the guarantor, a general averment of notice of acceptance by plaintiff is sufficient, and the question whether it be reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court.—*Central Savings Bank v. Shine*, 456.

See **BILLS AND NOTES**, 11.

H

HUSBAND AND WIFE.

1. *Contracts — Bills and notes — Husband and wife — Survivorship.*—Where certain promissory notes, given for rent of land which was the separate estate of a married woman, were made payable to the order of her husband and herself, they were not payable, therefore, to the husband alone, nor were the rents payable to him on the strength of such notes, as his wife's appointee. But these notes were neither real estate nor personal chattels in possession, but choses in action, and the joint payee took them by survivorship.—*Shields v. Stillman*, 82.
2. *Husband and wife — Fraudulent conveyances — Purchase in the name of the wife, out of the property of her insolvent husband, creates a trust in favor of the husband's creditors.*—Where property is conveyed to a married woman as a cover to enable her husband to hold and enjoy the property through her as his own, if it is shown that the purchase money was in fact paid by him, or that the credit was given to him, the wife should be held to have taken the property in her name for his use, and a trust would result to him for the benefit of his creditors.—*McLaran v. Mead*, 115.
3. *Husband and wife — Fraudulent conveyances — Purchase of property with money raised by a pledge of wife's property, or on credit given to her, does not create a resulting trust for her husband's creditors.*—Where property is purchased in the name of a married woman, with money raised on a note made by her, secured by a pledge of her own property, or by credit given to her on the faith of such a pledge, and not to her husband, and if she designed to purchase for herself, with her own means, and with no fraudulent intent, the fact that the husband signed the note with her and has a marital interest in her property does not create a resulting trust in favor of his creditors. When a married woman is not dealing with her sole and separate estate, so that it becomes necessary that some one else should be a party to the note given to make it valid, and that her husband should join in the deed of trust, the mere fact of such joinder by the husband is not a badge of fraud, but something more should appear—as that the credit was given to the husband, or that he has paid or arranged to pay, in whole or in part, out of his own means.—*Id.*
4. *Equity — Husband and wife — Trustee — Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—*Walter v. Walter*, 140. *
5. *Husband and wife — Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate provision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband

HUSBAND AND WIFE—(Continued.)

jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*

6. *Husband and wife—Marital interest of husband in his wife's property liable for his debts, when.*—The marital interest of the husband in his wife's realty was, before the adoption of the provision contained in section 14, ch. 115, Gen. Stat. 1865 (Wagn. Stat. 935, § 14), liable for his debts not contracted by him prior to his marriage, or as surety, or prior to the time when his wife came into possession of her property. (R. C. 1855, p. 754.)—Grimes v. Long, 340.

See DOWER, 1; EQUITY, 11; WILLS, 7, 8.

I**INDORSEMENTS.**

See BILLS AND NOTES.

INFANTS.

See PRACTICE, CIVIL—PARTIES, 1.

INJUNCTION.

1. *Injunction—Delay in sale of personal property—Depreciation—Measure of damages—Construction of statute.*—When delay in the sale of personal property is caused by an injunction, and the depreciation in the salable value of the property is an incident of the delay, the loss, within the meaning of the statute (Wagn. Stat. 1030, § 11), is held to be "occasioned" by the injunction. And the depreciation is the measure of damages.—Meysenburg, Trustee of Sternberg, v. Schlieper, 426.
2. *Mortgages and deeds of trust—Injunction to stay—Sale under deed of trust—Action of damage under—Measure of damages.*—By the terms of a deed of trust on personal property, upon the non-payment of the first note at maturity all the others became at once due, and the property might be sold to satisfy them. The first note when due was unpaid, and the property was advertised for sale, but the sale was prevented by injunction. Subsequently, before the second note became due, the first note was paid, the injunction was dissolved, and the property, on maturity of the second note, was sold to satisfy the remaining indebtedness. But meanwhile, pending the injunction, the property had greatly fallen in value, and failed to satisfy various encumbrances which had been put upon the property. In an action of damages against the plaintiffs in the injunction, by the holder of a subsequent unsatisfied deed of trust, it was contended by defendants (plaintiffs in the injunction) that an actual sale was a necessary condition to the maturity of the notes not due on their face; and that hence, no sale occurring, they were not responsible for a depreciation in the value of the property up to the time when the second note purported to be due; but held by the court, that defendants having, by their unwarrantable interference, prevented the sale, could not avail themselves of the non-performance which they had occasioned.—*Id.*

See REVENUE, 5.

INSTRUCTIONS.

See PRACTICE, CIVIL—TRIALS, 1, 2, 3.

INSURANCE, FIRE.

1. *Insurance, fire, contract of—What acts essential to.*—The rule of law now is that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient.—*Lungstrass v. German Ins. Co.*, 201.
2. *Insurance, fire, policy of—Letter of acceptance by insured not necessary to close contract, when—Remittance—Failure to remit premium—Agency.*—The agent of a fire insurance company, in response to his application therefor, received from it a policy of insurance on his goods. On the day of its receipt he made an entry in his book of accounts with the company of the amount chargeable against him for the premium. The next day the goods were burned. On his announcement of the loss, the company refused to pay on the ground that his premium had not been forwarded. *Held*—
 1. That his entry of indebtedness being made on the receipt of the policy, and in a book in which his accounts with his principal were regularly kept, sufficiently closed his contract, without necessity of forwarding a letter of acceptance.
 2. That inasmuch as his remittances were forwarded only at the end of each month, his failure to pay the amount of the premium before that time did not release the company from its liability.—*Id.*

INTEREST.

1. *Interest—Money received by party who improperly applies it to his own use.*—When money is received by a party who applies it to his own use, or otherwise improperly detains it, he should pay the interest upon the money so used or detained.—*Jefferson City Savings Association v. Morrison*, 273.
See USURY.

J

JAIL.

See COUNTIES, 1.

JEOPAILS.

See PRACTICE, CIVIL, 1.

JUDGMENTS.

1. *Foreign judgments, effect of within State—Res adjudicata.*—Where a suit was brought in this State on a judgment rendered in another State, and while the suit in this State was pending, defendant filed a petition in the foreign court, where the original judgment was rendered, setting up certain facts and praying that the judgment might be set aside; and the plaintiff filed answer, and the cause was tried and the petition of defendant dismissed. *Held*, that in our court, on trial of the suit brought on the original judgment, the matters set up by defendant, in this petition to have the judgment set aside, were *res adjudicata*, and that defendant could not set up as a defense in the suit on the original judgment the same matters which had been decided against him on his petition to set aside said judgment.—*Poorman v. Mitchell*, 45.

JUDGMENTS—(Continued.)

2. *Wills, proof of—Probate Court, judgment of, how impeached.*—The judgment of a court probating a will is like the judgment of any other court of competent jurisdiction, and cannot be impeached collaterally. It matters not that the court erred, or that the evidence upon which it was founded was not sufficient to justify it. That would simply constitute an error in the proceedings of the court rendering it. But the judgment would be valid until reversed, annulled, or set aside in the proper manner. The evidence is no part of the judgment, and whether it was rendered upon sufficient or legal evidence can only be inquired into by a direct proceeding. The evidence does not confer jurisdiction upon the court; it is merely the means by which the conclusion is arrived at.—*Dilworth v. Rice*, 124.
3. *Practice, civil—Jeofails, statute of—Dismissal and discontinuance.*—Under the statute (Wagn. Stat. 1036, § 19) no judgment, after an actual trial or submission, will be affected by any previous dismissal of the suit. And *semble*, that where parties appear and go to trial after an order of dismissal, it will be presumed to have been set aside.—*Thurman v. James*, 235.
4. *Judgment—Amount recovered stated in numbers, effect of.*—*Semble*, that a judgment expressing the amount recovered simply in figures, in combination with the dollar-mark, thus "\$121.00," is not, within the meaning of the statute (Gen. Stat. 1865, p. 583, § 15; Wagn. Stat. 420, § 15), absolutely void and of no avail in a collateral proceeding.—*Fullerton v. Kelliher*, 542.
5. *Judgment, former, when bar to suit.*—An action to have defendant's dower in certain lands admeasured will be barred by a former judgment between plaintiff's grantor and defendant, based on a proceeding to have dower assigned in the same land.—*Ervin v. Brady*, 560.
6. *Practice, civil—Judgment, finding of facts in.*—A court sitting as a jury is not bound to incorporate in its judgment a finding upon every fact which may arise in the cause.—*Id.*

See ADMINISTRATION, 1; EQUITY, 4; EXECUTIONS, 1, 2, 4, 5, 7; PRACTICE, CIVIL—ACTIONS, 1; PRACTICE, CIVIL—APPEALS, 4, 5.

JURISDICTION.

See PRACTICE, CRIMINAL, 9, 10, 12.

JUSTICES OF THE PEACE.

1. *Justice of the peace—Acts of after expiration of term of office.*—When a justice of the peace continued to act officially after the expiration of his commission, his continued acts *colore officii* within the jurisdiction of a justice *de jure* were valid as to third parties, and could not be collaterally drawn in question.—*State, to use of Liechter, v. Miller*, 251.

See JUSTICES' COURTS.

JUSTICES' COURTS.

1. *Practice, civil—Justices' courts—Appeals—Judgment in the appellate court for an amount exceeding the justice's jurisdiction, improper.*—On an appeal from the judgment of a justice of the peace, a judgment in the appellate court for an amount which, exclusive of interest, exceeds the jurisdiction of a justice's court, is not warranted. The judgment must be limited to an amount within the jurisdiction of the justice.—*Shields v. Stillman*, 82.
2. *Mandamus—Justices' courts—Appeal—Rule and attachment.*—Manda-

JUSTICES' COURTS—(Continued.)

mus will lie only where the relator has a specific right and the law has provided no other specific remedy. The statute (Wagn. Stat. 849, § 10) has provided that if a justice fail to allow an appeal in a case where the same ought to be allowed, or when, from absence, sickness, or other cause on his part, the appeal cannot be taken in time, the Circuit Court, or other court having jurisdiction of such appeals, may by rule and attachment compel the justice to allow the appeal. This is a specific remedy, and there is no necessity to invoke a writ of *mandamus* to secure the appeal, and such a writ is properly refused.—State ex rel. Wheeler v. McAuliffe, 112.

See JUSTICES OF THE PEACE; PRACTICE, CIVIL—ACTIONS, 1; RAILROADS, 5.

L

LANDLORD AND TENANT.

1. *Landlord and tenant—Judgment for rent in a suit for possession under the landlord and tenant act, proper even when it is not asked for.*—Where a plaintiff complies with the statute (Wagn. Stat. 882, § 33) and files the statement therein required, and dispenses with any form of prayer, he is entitled not only to a judgment for possession, but for rent also, and it is the duty of the justice to render such judgment.—Shields v. Stillman, 82.
2. *Leasehold estate—Possession of, prima facie evidence of ownership.*—Possession of a leasehold estate after the death of the lessor, by his heirs, is *prima facie* evidence of their ownership of the same.—Collins v. Banister, 435.
3. *Landlord and tenant—Landlord in possession after abandonment by tenant—Claimant must resort to his action, and cannot intrude without it.*—When a tenant leaves, either at the end of the term or by a surrender of the ease, the landlord comes into sole possession and is possessed of the premises, although not personally present. And it is not the constructive possession alone arising from title, but a real possession arising from his relation of landlord, had when he put the tenant in, held through the tenant, and continued and become exclusive at the termination of the tenancy, and until he has time by his acts to indicate his intentions in regard to the possession. And no one whose claim is *in invitum*—as that of a purchaser of the premises at an execution sale—has the right to enter without first resorting to his action, giving the occupant the advantage of possession and the right to contest the claim. But *semble*, that the rule is different in case of a voluntary grant by the landlord. (*Vide* Pentz v. Kuester, 41 Mo. 447.)—May v. Luckett, 472.
4. *Landlord and tenant—Lease, construction of—Abandonment—Jury—Construction of lease not left to, when.*—A dwelling-house was leased solely on condition that the tenant should continuously occupy and run a saw-mill owned by the landlord. This was the sole consideration of the lease. The instrument contained no condition of forfeiture. Held, that an abandonment of the mill was an abandonment of the house, and, at the option of the landlord, terminated the lease.

In suit by the landlord for possession of the dwelling-house, the court should tell the jury what formed the consideration for the lease, as far as shown by

LANDLORD AND TENANT—(Continued.)

the instrument, instead of leaving that point to be determined by the jury.—*Crawley v. Mullins*, 517.

See **LANDS AND LAND TITLES**, 9, 10.

LANDS AND LAND TITLES.

1. *Lands and land titles—Act of Congress of July 4, 1836—Notice of claim under, sufficiency of.*—In suit for the recovery of land, under the act of Congress of July 4, 1836, plaintiff offered in evidence a written request to the recorder of lands in and for the territory of Missouri, to record all registered concessions found in certain books named, then in his office. But it did not appear that those under whom plaintiff claimed had any agency in giving the notice, nor that any signer of the paper was interested in the lands in question, or that any of them represented those who were or claimed to be so interested. The notice named no claimant and described no land, nor did it intimate that any one was in fact claiming under the concessions referred to. *Held*, that the paper was not such notice of claim as the act contemplated.—*Connoyer v. Schaeffer*, 164.
2. *Lands and land titles—Boundaries—Monuments will not prevail, when.*—Although monuments will generally prevail over other calls in a deed, yet if, taking the whole deed together, they are apparently erroneous, they will be disregarded. And a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed.—*Jamison v. Fopiano*, 194.
3. *Lands and land titles—Vendor—Levy on interest of vendee for purchase money—Effect as to vendor.*—Where a vendor, under a judgment rendered in his favor for the purchase money of land, levies upon the interest of the vendee and purchases the same at the execution sale, he will stand just where he stood before; the vendee will be entitled to redeem and to have a conveyance upon the payment of the purchase money.—*Pixlee v. Osborn*, 313.
4. *Ejectment—Possession, adverse, what sufficient.*—Possession, to be adverse and bar the original owner, must be actual, open and notorious, under claim of ownership, and continuous and uninterrupted, either in the party holding or his grantor.—*Bowman v. Lee*, 335.
5. *Conveyances—Record—Notice.*—One who has a conveyance from the actual owner of land, directly or through others, is protected under the registry act, although there may have been a previous conveyance, provided such prior deed be unrecorded and he has no actual knowledge of its existence.—*Id.*
6. *Estoppel—Park—Land dedicated for common, cannot be diverted to other use, when.*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (*Wagn. Stat. 1828, § 8*) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." *Held*, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees of the town from diverting the property from its original use and the purpose specified by the donor in the act of dedication, by causing public streets to be run through it.

LANDS AND LAND TITLES—(Continued.)

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

7. *Notice sufficient to put one on inquiry sufficient.*—Notice sufficient to put one upon inquiry as to the existence of a right or title, is in law presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right notwithstanding the exercise of due diligence.—*Rhodes v. Outcalt*, 367.
8. *Mortgages and deeds of trust—Mistake in description—Grantee treated in equity as purchaser of land intended to be conveyed—Rights of purchaser having knowledge of mistake—What facts sufficient to put upon inquiry.*—A. owned city property designated as "lots 10, 11 and 12, in block 7." He made a deed of trust intending to convey the same, but, by mistake, the land described in the deed was lots of corresponding numbers in block 6, wherein he owned no real estate.

Held, 1st, that notwithstanding said false description, the grantee in equity actually secured a lien on the property intended to be conveyed; and not a lien merely, but his rights were such that he would be regarded in the light of an actual purchaser. The debtor was bound in conscience to correct the mistake. And his obligation to correct it was such an equity as would bind his heirs, voluntary grantees and purchasers with notice. 2d, that where a creditor of A. subsequently had the land in block 7 sold under a judgment against A., and bought it in—knowing, at the time, of the deed of trust, and of the fact that A. owned the property sold, and not that in block 6—the purchaser had knowledge sufficient to put him on careful and diligent inquiry as to the rights of the grantee in the deed of trust, and that he bought subject to the lien of that deed.—*Id.*

9. *U. S. land warrants—U. S. land patents—Patentee dead at time of issue, patent relates back to date of enlistment—Dower.*—Where a land warrant issued from the United States to a soldier for services in the war of 1812, and the patent therefor was made out in his name but after his death, under the acts of Congress (5 U. S. Stat. at Large, 31, 497), the patent will relate back to the date of his enlistment; he will be held to have died seized of the land, and his widow will be entitled to her dower therein.—*Johnson v. Parcels*, 549.
10. *Military bounty warrants are real estate.*—Military bounty land warrants have always been considered real estate, and go, upon the death of the holder, to the heirs at law, and not to the executors or administrators.—*Id.*

See DOWER, 1; EQUITY, 11; REVENUE, 6; UNLAWFUL DETAINER, 1.

LAND WARRANTS.

See LANDS AND LAND TITLES, 9, 10.

LARCENY.

See PRACTICE, CRIMINAL, 5.

LEASE.

See LANDLORD AND TENANT, 2, 4.

LETTER OF CREDIT.

See CONTRACT, 3.

LIBEL.

1. *Damages — Libel — Justification — Close of case, who entitled to.*—When defendants in an action for libel plead justification, that plea does not entitle them to open and close the case. Where, as in such case, the damages are unliquidated, and to be computed by a jury and depend upon proof, the plaintiff is generally entitled to open.—*Buckley v. Knapp*, 152.
2. *Damages — Libel — Justification — Want of knowledge of publication of libel.*—Under the statute touching libel (Wagn. Stat. 1021, § 44), defendant may allege both the truth of the matter charged as defamatory and any circumstances in mitigation. But when the defendant bases his whole defense on the truth of the matter charged, testimony showing that the libelous article was published without his knowledge is inadmissible.—*Id.*
3. *Damages — Libel — Newspaper proprietor, responsibility of.*—The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it.—*Id.*
4. *Damages — Malice, express and implied.*—When slanderous words are spoken, or a libelous article is published falsely, the law will imply malice. There is no necessity of proving express malice.—*Id.*
5. *Damages — Libel, vindictive damages allowed in.*—Vindictive damages may be allowed in civil proceedings. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender.—*Id.*
6. *Damages — Libel — Wealth of defendant may be shown in estimating damages.*—In an action for libel, evidence may be properly introduced to show defendant's wealth as an element in estimating the damages.—*Id.*

LIEN, JUDGMENT.

See EQUITY, 4.

LIEN, MECHANICS'.

See MECHANICS' LIEN.

LIMITATIONS.

See CONSTABLES, 1; ESTOPPEL, 1; PRACTICE, CIVIL — PLEADING, 13.

LIQUOR, SALE OF.

See PRACTICE, CRIMINAL, 9, 10, 11, 12.

LIS PENDENS.

See EQUITY, 13.

M**MACON COUNTY.**

See COURTS, COUNTY, 1.

MALICIOUS PROSECUTION.

See PRACTICE, CIVIL — ACTIONS, 2.

MANDAMUS.

1. *Mandamus — Justices' courts — Appeal — Rule and attachment — Mandamus* will lie only where the relator has a specific right and the law has provided no other specific remedy. The statute (Wagn. Stat. 849, § 10) has provided that if a justice fail to allow an appeal in a case where the same ought to be allowed, or when, from absence, sickness, or other cause on his

MANDAMUS—(Continued.)

part, the appeal cannot be taken in time, the Circuit Court, or other court having jurisdiction of such appeals, may by rule and attachment compel the justice to allow the appeal. This is a specific remedy, and there is no necessity to invoke a writ of *mandamus* to secure the appeal, and such a writ is properly refused.—State ex rel. Wheeler v. McAuliffe, 112.

2. *Mandamus—Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.—State ex rel. Vail v. Draper, 213.
3. *Mandamus will issue against county judges for payment of warrants drawn on swamp land funds.*—In proceedings before the Circuit Court for *mandamus* against the judges of the County Court, requiring payment of warrants ordered by them and drawn on the "swamp land" fund, where the return sets up no equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the writ will issue; and it cannot be objected that no judgment had been first obtained against the County Court on the claim evidenced by the warrants; for being drawn on a special fund, such judgment could not be obtained.

Were the proceedings appealable to the Circuit Court, *mandamus* would not lie; since that remedy is afforded only when others fail. But being an attempt to induce the payment of claims already audited, there was nothing in regard to which an appeal would lie.—State ex rel. Zimmerman v. Justices of Bolinger County, 475.

MECHANIC'S LIEN.

1. *Mechanic's lien on frame building would not authorize the sale of the land.*—Under the statute of 1855 (R. C. 1855, p. 1068, § 10), a mechanic's lien simply attaching to a frame building would not authorize the sale of the land.—Samuels v. Shelton, 444.

MERCHANTS.

See SCHOOLS, 2.

MILITARY OFFICERS.

See SALES, 1.

MISTAKE.

See EQUITY, 4.

MONUMENTS.

See CONVEYANCES, 5; LANDS AND LAND TITLES, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Equity—Husband and wife—Trustee—Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—Walter v. Walter, 140.
2. *Husband and wife—Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate pro-

MORTGAGES AND DEEDS OF TRUST—(Continued.)

vision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*

3. *Equity—Action to reform deed—Mistake in description of land in mortgage—Judgment liens—Relief.*—When a deed of trust by mistake omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land, obtained by a creditor with notice, after the first but before the second deed. But such action of the court can only be justified when the mistake clearly appears. No necessity can arise for a re-sale of the property where the evidence fails to show that it was sacrificed in consequence of the cloud thrown on the title by the judgment and sale.

Equity may not only enforce liens but remove them when they come in conflict with a superior equity.—*Young v. Cason*, 259.

4. *Deed of trust—Sale, notice of—“Public place,” what is.*—The setting up of notice of sale on the sides of a public square in a town or city satisfies the requirement contained in a deed of trust that the notice should be put up in a “public place” in such town or city.

The recitals by the trustee in his deed, that he put up the notices in “public places,” are sufficient *prima facie* evidence of that fact.—*Carter v. Abshire*, 300.

5. *Deed of trust, sale under—When land should be sold in lump, when in parcels.*—When property for sale under a deed of trust will bring more by being sold in separate subdivisions, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. But he must sell it in the lump or in parcels, according as will be most beneficial for the debtor; and he will be held to a strict accountability for the exercise of the discretion devolved upon him.—*Id.*

6. *Deed of trust—Surplus, payment of—Creditor, claim of to surplus by reason of purchase of land and notes.*—A trustee in a deed of trust cannot refuse to pay over to one who has purchased the encumbered property subject to the trust, any surplus after satisfying the trust notes, on the ground that the purchase was without consideration and a fraud upon creditors. Until set aside in a direct action by the creditors, such sale will stand, and strangers will not be permitted to prove the fraud. And he cannot refuse so to pay over the surplus on the ground that the purchaser at the trust sale had already become the owner of the land and the assignee of the notes, and thus claimed to be entitled to the money. The rights of the creditor cannot be passed upon in this collateral manner.—*Reid v. Mullins*, 344.

7. *Deed of trust—Advertisement under, what sufficiently accurate.*—An advertisement, under a deed of trust on a certain lot of ground, correctly recited the number of the lot, and further stated that the land was to be sold

MORTGAGES AND DEEDS OF TRUST—(Continued.)

with all the improvements on it, but incorrectly stated the number of houses embraced in it. No attempt was made to show that any one was misled by the advertisement. *Held*, that the advertisement was sufficiently accurate.—*Sumrall v. Chaffin*, 402.

8. *Deed of trust — Sale by trustee — Property should be sold in subdivisions, when.*—It would be the duty of a trustee, in selling a number of tenement houses standing together, to dispose of them singly or to sell the land in parcels less than the whole, if any one desired to purchase in that way, even though the houses were so built together with their walls that the property would not be readily susceptible of a division.—*Id.*
9. *Equity — Title bond — Deed of trust, sale under after death of grantor — Purchase at by wife — Equity of wife, etc.*—B. gave to M. a title bond to certain land, and the wife of M., from her own estate, made partial payment of the purchase money, and added valuable improvements to the land. Afterward M. gave B. a trust deed on his equity in the property to secure the payment of the balance of the purchase money, remainder over to his wife. After M.'s death the lots were sold under the deed of trust to satisfy the unpaid notes, and most of them were bid in by the wife for herself, with her own means, at a price sufficient to pay the notes. B. then executed a deed for the whole to the heirs of M. Suit was brought against the widow by the purchaser at the administrator's sale of the interest of M. in the property, for the title thereto. *Held*, that it was properly dismissed, because, first, if the deed from B. conveyed his title it went to the heirs of M., and the judgment against the widow could only cut off her equity; second, as against her there was no equity. All the money that went for the purchase and improvement of the property belonged to her; and when M. conveyed his equity in trust for the payment of the purchase money, remainder to his wife, it was not a settlement in fraud of creditors, but a simple act of justice, and did not create a resulting trust in their favor.—*Buckner v. Stine*, 407.
10. *Mortgages and deeds of trust — Suit for foreclosure — Party coming in and defending against claim for debt must show his interest — Construction of statute.*—Where, in a suit to foreclose a mortgage, parties are let in to defend under a *prima facie* title, and, in accordance with the provisions of section 7 of the act touching mortgages (Wagn. Stat. 955), answer in bar of the debt secured by the mortgage, their interest in the property encumbered may be put in issue by the pleadings. The requirement to set up their interest is implied from the terms of that section which permit him to become a party at all.
When the mortgage was in fact satisfied, their interest could not be impeached in a direct proceeding by them to avail themselves of their title. In such case the mortgagees would be an intermeddler as between them and others, and would have no interest of his own to protect.—*Bates v. Miller*, 409.
11. *Deed of trust — Assignment — Must be signed by all, etc.*—Certain grantees in a deed of trust conveying real estate, in common with various other creditors of the grantor, signed an agreement releasing him from his indebtedness on his conveyance to them *pro rata* of certain portions of the land embraced in the deed of trust. Some of the grantees therein refused to sign the agreement. Those signing did so with the understanding that the remainder should

MORTGAGES AND DEEDS OF TRUST—(Continued.)

join in it. *Held*, that the signers of the agreement did not thereby lose their rights under the deed of trust, first, because the grantor in the trust deed could pass no title to the land unless all the grantees entered into the agreement; second, because they were not bound by the agreement unless all signed it.—*Barcroft v. Lessieur*, 418.

12. *Mortgages and deeds of trust — Injunction to stay — Sale under deed of trust — Action for damages under — Measure of damages.*—By the terms of a deed of trust on personal property, upon the non-payment of the first note at maturity all the others became at once due, and the property might be sold to satisfy them. The first note when due was unpaid, and the property was advertised for sale, but the sale was prevented by injunction. Subsequently, before the second note became due, the first note was paid, the injunction was dissolved, and the property, on maturity of the second note, was sold to satisfy the remaining indebtedness. But meanwhile, pending the injunction, the property had greatly fallen in value, and failed to satisfy various encumbrances which had been put upon it. In an action of damages against the plaintiffs in the injunction, by the holder of a subsequent unsatisfied deed of trust, it was contended by defendants (plaintiffs in the injunction) that an actual sale was a necessary condition to the maturity of the notes not due on their face, and that hence, no sale occurring, they were not responsible for a depreciation in the value of the property up to the time when the second note purported to be due; but *held* by the court, that defendants having by their unwarrantable interference prevented the sale, could not avail themselves of the non-performance which they had occasioned.—*Meysenburg, Trustee of Sternberg, v. Schlieper*, 426.

13. *Trusts and trustees — Trustee's sale — Fraud, proof touching — What insufficient.*—The fact that property was sold by a trustee for a sum less than half its value, and was shortly afterward sold back to him by the purchaser for the same amount, is not sufficient of itself to fix on the trustee the charge of having speculated at the sale in violation of his duty. To that end there should be some proof of an understanding between him and the bidder at or prior to the sale.—*Boehlert v. McBride*, 505.

N**NEWSPAPERS.**

See **LIBEL**, 3.

NON-RESIDENCE.

See **EVIDENCE**, 2.

NOTICE.

See **EQUITY**, 13; **LANDS AND LAND TITLES**, 5, 6, 7; **MORTGAGES AND DEEDS OF TRUST**, 7, 8.

O**OFFICERS.**

1. *Mandamus — Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.—*State ex rel. Vail v. Draper*, 218.

OFFICERS—(Continued.)

2. *Officer in by right cannot be ousted by action of governor — Party claiming must resort to quo warranto — Payment, how made by State auditor in case of contest.*—After an officer has received his commission, has been inducted into office, and is in by color of title, he cannot be ousted by the action of the governor, as by the appointment of another in his place. The party claiming the office in such case must resort to *quo warranto*. In making payments under such circumstances, the State auditor is bound to take notice that the incumbent is an officer *de facto*, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.—*Id.*
3. *Officer, acceptance of office incompatible with another office — Offices of county and circuit clerk not incompatible.*—The acceptance, by the incumbent of one office, of another, and one whose duties are incompatible in law therewith, will vacate the former. But the duties of clerk in one court are not incompatible with those of another simply because the two courts may hold their sessions at the same time. The offices of clerk in the Circuit and County Courts having been long and notoriously held in various parts of this State by the same person, without legislation relating thereto, while other offices have been pronounced incompatible, such silence of the Legislature is equivalent to its sanction.—*State ex rel. Moore v. Lusk, 242.*

See **CIRCUIT ATTORNEYS; CONSTABLES; EXECUTIONS; JUSTICES OF THE PEACE; PENITENTIARY; PUBLIC PRINTER; REVENUE, 3, 5; SALES; SECRETARY OF STATE; SHERIFFS' SALES.**

ORDINANCES, CITY.

See **ST. LOUIS, CITY OF, 1, 2.**

P

PACIFIC RAILROAD.

1. *Revenue — Pacific Railroad liable for county taxes — Construction of statute.*—Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of State taxes, nevertheless, under the constitution (art. II, § 16) and the general statute (2 Wagn. Stat. 1159-61, §§ 1-9), the company was liable for its county taxes.—*State, to use of Pacific R.R., v. Dulle, 282.*

See **RAILROADS, 1.**

PARK.

See **DEDICATION TO PUBLIC USE.**

PARTITION.

1. *Partition — Petition for, failing to point out each interest, subject to demurrer.*—A petition in a suit for partition, which fails to set forth the ownership of each several interest in the land sought to be divided, and contains no averment that the owner was unknown, or that there was any difficulty in pointing out the owner and defining his interest, is, under the statute (Wagn. Stat. 967, § 8), demurrable for that reason.—*Rogers v. Miller, 378.*

PARTNERSHIP.

1. *Partnership, what constitutes — Equity — Judgment affirmed.*—A brought an action in equity against B. to wind up an alleged partnership. There was no written agreement between them. A. testified that they were partners,

PARTNERSHIP—(Continued.)

- and B. denied it. Nothing was paid by A. It was known for two years to A. that B. denied the partnership right claimed by him, but he nevertheless allowed the whole matter to sleep until B. had left the State. It was shown that the parties were operating together in some way as to the subject-matter of the alleged partnership; that B. rendered some service in the matter, and A. offered to make compensation for it. *Held*, that in such a case the burden of proving the partnership was on the plaintiff, and the evidence recited was not sufficient to establish it.—*Gatewood v. Bolton*, 78.
2. *Partnership, community of profits essential to.*—An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the essential characteristic of every partnership agreement.—*Maclay v. Freeman*, 234.
3. *Partnership, what constitutes—Action founded on, nature of suit in.*—A. and B. entered into a contract for the purchase and sale of hogs and cattle. A. was to contribute his services in collecting the stock. B. was to furnish the capital. They were to divide the profits. No special contract was made as to the losses. *Held*, that a community of profits made them jointly liable for the losses; that they were partners, and that suit by A. for his proportion of the profits should have been an application to court for a settlement of partnership accounts, analogous to a late proceeding in chancery.—*Lengle v. Smith*, 276.
4. *Partnership—Individual liability—Partnership articles.*—The articles of partnership of A. & Co. provided that A. should be the financier of the firm and should provide funds for carrying on the business, but should be obliged to use his individual name alone for the purpose of procuring money by notes or otherwise, and should be individually liable for all debts contracted in that way, and for all loans which might occur in consequence of indorsements made for such purpose. *Held*, that said articles did not authorize A. to bind the firm by notes drawn in his own name, or to involve them as to money borrowed, except when actually embarked in its affairs.—*Dreyer v. Sander*, 400.

See **BILLS AND NOTES**, 8.

PENITENTIARY.

1. *Damages—Officers, liability of, for torts of employees—Allegations in action for—What averments necessary.*—A warden or inspector of the State penitentiary will not be liable in damages for the torts of a convict, on the mere averment that they carelessly and negligently suffered the convict to go at large, whereby the injury resulted, etc. Under the statute (Wagn. Stat. 983-5, §§ 2, 5, 6, 17, 25) it was discretionary with the officers to determine how and in what manner convicts employed outside of the penitentiary should be suffered to go at large. And officers acting in a discretionary capacity will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty.—*Schoettgen v. Wilson*, 253.

PERJURY.

See **PRACTICE, CRIMINAL**, 4.

PETTIS COUNTY WARRANTS.

1. *Warrants, Pettis county—Made payable out of road and canal fund—Holder must look to that fund only.*—The holder of a Pettis county war-

PETTIS COUNTY WARRANTS—(Continued.)

rant, made payable on its face out of "the road and canal fund" of the county, can look only to that fund for the payment of his claim, and cannot compel the county to pay the warrant out of its own proper funds.

And the liability of the county is not altered even though the road and canal fund may have been diverted from its proper purpose by legislative enactment or the action of the county, where it does not also appear that the county had actually received, or held subject to its control, some portion of that fund which it had not faithfully applied to the payment of the warrant.

The enabling act of March 21, 1868 (Sess. Acts 1868, p. 42), does not relieve the holder of the warrant.—*Kingsbury, Ex'r of Kingsbury, v. Pettis Co.*, 207.

POWERS.

See **WILLS**, 4.

PRACTICE, CIVIL.

1. *Practice, civil—Jeofails, statute of—Dismissal and discontinuance.*—Under the statute (Wagn. Stat. 1036, § 19) no judgment, after an actual trial or submission, will be affected by any previous dismissal of the suit. And *semble*, that where parties appear and go to trial after an order of dismissal, it will be presumed to have been set aside.—*Thurman v. James*, 235.

PRACTICE, CIVIL—ACTIONS.

1. *Practice, civil—Actions—Suit on judgment before a justice.*—When a debtor in a judgment before a justice has left the county in which the judgment was rendered, the judgment creditor is at liberty to revive his claim by a direct suit upon the judgment itself.—*Wood v. Newberry*, 322.
2. *Practice, civil—Actions for malicious prosecution—Proof of arrest and bail not essential to.*—A civil suit, instituted and prosecuted without probable cause and maliciously, lays a good foundation for a suit for damages, although no arrest attended the prosecution of the malicious suit.—*Brady v. Ervin*, 531.

See **CONTRACTS**, 7; **EJECTMENT**, 1; **EQUITY**; **HUSBAND AND WIFE**, 5; **INJUNCTION**; **MANDAMUS**; **PROHIBITION**, **WRIT OF**; **QUO WARRANTO**; **RAILROADS**, 5; **TRESPASS**, 1.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—Appeal—Supreme Court will not weigh evidence in law cases.*—The Supreme Court will not look into evidence or pass upon its weight in law cases, even where the case was tried by the court below without the aid of a jury.—*Gould v. Smith*, 43.
2. *Practice, civil—Appeal—Motion for new trial not necessary when the error complained of appears on the face of the record.*—When the error complained of is not shown by a bill of exceptions, but appears on the face of the record proper, no motion for a new trial is necessary.—*Ancell v. City of Cape Girardeau*, 80.
3. *Practice, civil—Appeal—Affidavit should be filed, when.*—When the affidavit and bond for an appeal were not filed during the term at which judgment was rendered, the appeal should be dismissed. (Gen. Stat. 1865, ch 172, § 11; Wagn. Stat. 1059, § 11.)—*Lengle v. Smith*, 276.

PRACTICE CIVIL—APPEAL—(Continued.)

4. *Practice, civil — Judgment for costs — Appeal — Nonsuit.*—A judgment for costs is not a final judgment, and will not support an appeal or writ of error. And the rule holds, although the judgment was rendered on a nonsuit.

Where a nonsuit is taken, in order to justify an appeal or writ of error the judgment should be formally set out, "that it is by the court therefore considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of plaintiff his costs," etc.—*Boggeas v. Cox*, 278.

5. *Practice, civil — Bill of exceptions, judgment must be set out in.*—When the bill of exceptions fails to set out the judgment so as to show whether it was absolute or conditional, interlocutory or final, the appeal will be dismissed.—*Phol v. Bunce, Adm'r*, 289.

6. *Judgment — Costs — Appeal.*—A judgment for costs will not support an appeal or writ of error.—*Preston v. Mo. & Penn. Lead Co.*, 541.

7. *Practice, civil — Judgment for costs not final.*—A judgment for costs only will not support an appeal.—*Zahnd v. Darling*, 557.

8. *Practice, civil — Appeal — Objections — Exceptions.*—Objections not saved by exceptions will not be examined on appeal.—*Id.*

See JUSTICES' COURTS, 1, 2; PRACTICE, CIVIL—TRIALS, 9, 10; PRACTICE, SUPREME COURT; WILLS, 1, 2.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil — Parties — Minority, motion to set aside judgment on account of.*—Defendant filed a motion for a new trial, accompanied by an affidavit that he was under the age of twenty-one at the time he appeared and entered on his defense, and asked the court to set aside the judgment. *Held*, that the fact that the judgment was against an infant defendant must be shown. The statement that he was under twenty-one years of age when his appearance was entered did not show but that he might have litigated the case for a long time after he became of full age, and before the judgment was rendered against him; and the motion to set aside the judgment and grant a new trial was properly overruled.—*Stupp v. Holmes*, 89.

See PRACTICE, CIVIL—PLEADING, 11.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil — Pleading — Demurrer by all of several defendants, when the petition shows a good cause of action against some, should be overruled as to them.*—When a petition against several defendants shows a good cause of action against some of them, it should be overruled as to them, although sustained as to the others.—*Ancell v. City of Cape Girardeau*, 80.

2. *Practice, civil — Answer — New matter — Allegations, sufficiency of — Replication.*—In a suit on an attachment bond the petition averred generally that plaintiff in the attachment had failed to prosecute his action without delay and with effect; and further, that a judgment had been rendered for defendant in the transaction on a plea in abatement.

Held, that an allegation in the answer that the attachment suit was still pending on a motion for new trial, and undisposed of, set up no new matter requiring a replication.

In general, any fact which plaintiff is bound to prove in the first instance to sustain his action, is not new matter. In the case supposed, plaintiff, in order to show that defendant had failed to prosecute his action without delay

PRACTICE, CIVIL—PLEADING—(Continued.)

- and with effect, was bound to prove that the attachment suit had been finally disposed of.—State, to use of Demuth, v. Williams, 210.
3. *Practice, civil—Answer setting up new matter should confess and avoid.*—An answer setting up new matter by way of defense should confess and void.—*Id.*
 4. *Practice, civil—Pleadings—Answer after demurrer overruled, effect of.*—A defendant who answers upon the merits after demurrer overruled, thereby practically withdraws the demurrer and waives all technical objections to the petition.—Township Board of Education v. Hackmann, 243.
 5. *Practice, civil—Pleadings—Garnishment—Continuance, affidavit for.*—An affidavit for continuance in the trial of an interplea joined under an attachment suit, which affidavit was entitled as in the cause of the plaintiffs, against garnishees in the attachment, was properly refused.—Adams Express Co. v. Reno, 264.
 6. *Practice, civil—Pleading—Demurrer waived by answering over.*—Defendant, by answering over after demurrer overruled, practically abandons the demurrer.—Jefferson City Savings Association v. Morrison, 273.
 7. *Practice, civil—Pleadings—Payments made after pleadings made up—Testimony touching, improper.*—The admission of testimony showing payments made on a debt sued for after the pleadings are made up is clearly erroneous. After-occurrences are not in issue and not open to investigation.—Sweet, Adm'r of Jones, v. Jeffries, 279.
 8. *Practice, civil—Pleadings—Demurrer, on ground that another suit is pending embracing same parties and cause of action, should be overruled.*—A demurrer to a petition, based on the ground that another suit was then pending between the same parties and for the same cause of action, when no such facts appeared in the petition, should be overruled.—Arthur v. Rickards, 298.
 9. *Practice, civil—Petition—Failure of to state facts sufficient to constitute a cause of action—In such case all testimony may be objected to.*—An objection to a petition that it does not state facts sufficient to constitute a cause of action, may be taken by objection to the admission of any testimony whatsoever.—Garner v. McCullough, 318.
 10. *Practice, civil—Petition, averments in, what sufficient.*—In a suit to recover damages for an invasion of plaintiff's possession or right of possession, the petition failing to aver that plaintiff was ever in possession, or that defendant's acts were wrongful, is bad. In such a petition the averment that plaintiff was "entitled to the exclusive possession" of the premises is an assumption of law, and is also bad.—*Id.*
 11. *Practice, civil—Demurrer—Objections not specified in will not be noticed on hearing of.*—In passing upon a demurrer, the court will not take notice of defects not therein specified, especially when the pleading can probably be amended so as to make a case or avoid the defect.—Alnut v. Leper, 319.
 12. *Practice, civil—Pleadings—Demurrer—Improper joinder of parties, who may demur.*—Where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur. If other parties join in the demurrer, it should be overruled as to them.—*Id.*
 13. *Practice, civil—Pleadings—Demurrer on ground of misjoinder of parties overruled as to those properly joined.*—Demurrer to the petition on the

PRACTICE, CIVIL—PLEADING—(Continued.)

ground of improper joinder of parties defendant should be overruled as to the party or parties against whom a good cause of action has been stated.—*Brown v. Woods*, 330.

14. *Practice, civil—Pleading—Limitations, statute of, to be available should be invoked in the lower court.*—A defendant, in order to avail himself of the statute of limitations, should insist upon it in his defense, and not invoke it for the first time in the Supreme Court.—*Wynn v. Cory*, 346.

15. *Practice, civil—Pleading—Petition—Description of a deed in—Execution—Consideration—Demurrer.*—A petition may describe a deed simply as a "conveyance," and under the statute its execution will be sufficiently implied from that term; and although it fails to allege a consideration of any sort, and fails to aver that the deed was one of gift, yet it will not be for that reason bad on demurrer as not stating a cause of action. The petition would be informal, and might be corrected on motion to make it more definite and certain. But defendant, having waived the informality and gone to trial upon answer, could not afterward say that it set up a void conveyance. And the allegation will be held sufficient to let in evidence and sustain a judgment.—*Poe v. Domec*, 441.

See **DAMAGES**, 8; **PARTITION**, 1; **RAILROADS**, 7, 9; **SECRETARY OF STATE**, 1; **TRESPASS**, 1; **USURY**, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Trials—Declarations of law must be clearly stated.*—All declarations of law should be so clearly stated in the instructions that there can be no substantial danger that the jury will be misled.—*Otto v. Bent*, 23.
2. *Practice, civil—Trials—Inconsistent instructions improper.*—Where two instructions are given which are both correct, but yet are apparently inconsistent or contradictory, it is error. The effect of correct instructions ought not to be impaired by those of an opposite tendency. (*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, cited and affirmed.)—*Id.*
3. *Practice, civil—Trials—Erroneous instructions not affecting the merit of the action, not ground for reversal.*—Instructions which do not materially affect the merits of the action, although erroneous, are not ground for reversing a judgment.—*Id.*
4. *Practice—Trials—Referee, finding by, stands as the verdict of a jury.*—The finding of a referee stands as the verdict of a jury; and when there is any evidence to sustain it, the Supreme Court will suppose that the whole evidence was properly weighed and the requisite effect given to it.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
5. *Practice, civil—Trials—Evidence, objections to should be made when the evidence is offered.*—Objections made to a certain class of evidence, when no evidence for the other side was then before the court for its consideration, are properly overruled; and where, after such objection made and overruled, the other side offered such evidence, and no objection was made, the defendant has no ground of complaint from the overruling of such previous objection.—*Stupp v. Holmes*, 89.
6. *Practice, civil—Trial, waiver of—Entry of waiver on record—Jury, court sitting as, must weigh evidence.*—When plaintiff waives his right to a jury trial, that waiver concludes him; and an entry of such waiver in the

PRACTICE, CIVIL—TRIALS—(Continued.)

record will conclude this court from further inquiry as to the fact of such waiver.

Where jury is waived, the court, sitting as a trier of the fact, must determine the weight of the testimony.—*Henry v. Beers*, 386.

7. *Practice, civil—Trial—Jury—Weight of evidence.*—The jury are the proper judges of the weight and reliability of evidence.—*Kirk v. Sportsman*, 383.
8. *Practice, civil—Verdict—Conclusive on questions of fact.*—On questions of fact in law cases, where the evidence is conflicting, the verdict of the trial court is conclusive.—*Central Savings Bank v. Shine*, 456.
9. *Practice, civil—Evidence—Verdict—Appeal.*—In law cases the Supreme Court will not reverse because the verdict is against the weight of the evidence.—*Wortman v. Campbell*, 509.
10. *Practice, civil—General verdict on different counts improper—Objection to, taken when.*—It is error to render a general verdict where the petition includes several distinct causes of action; but if a party wishes to avail himself of the error, he must, by an appropriate motion, bring the matter before the court trying the cause.—*Bigelow v. North Missouri R.R. Co.*, 510.
11. *Practice, civil—Verdict—Counts—Causes of action.*—Where a petition contains two counts, each embracing a separate cause of action, a general verdict is erroneous. But where the two counts embraced the same cause of action, and plaintiff elected to rest upon one of them, a verdict responsive to that count is proper.—*Ranney v. Bader*, 539.
12. *Practice, civil—Verdict—Surplusage, what may be treated as.*—In rendering judgment on a verdict, the court should reject as surplusage that part of the finding which fixes the amount of interest. It is never held to be error to reject as surplusage any statement in a verdict that does not affect the real finding, and enter judgment upon such finding.—*Id.*

See LANDLORD AND TENANT, 4; PRACTICE, CIVIL—PARTIES, 1.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Argument by counsel, order of, in discretion of trial court.*—The order in which counsel shall address the jury on the trial of a criminal case is a matter resting in the discretion of the court trying the cause, and unless it appears to have been exercised wrongfully and so as to injure a party, the Supreme Court will not decide that the discretion has been abused.—*State v. Waltham*, 55.
2. *Practice, criminal—Costs bills not presented within two years cannot be allowed by State auditor.*—Section 24, chapter 10, Gen. Stat. 1865 (*Wagn. Stat.* 1336), which provides that "Persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not afterward," applies to fees of circuit attorneys omitted in the original costs bills and demanded on supplementary costs bills, when not presented within two years after the determination of the prosecutions in which the fees accrued; and the law quoted is not repealed as to such items by the act of March 12, 1870 (*Sess. Acts* 1870, p. 29), authorizing a supplemental taxation.—*State ex rel. Johnson v. Draper*, 56.
3. *Practice, criminal—Assault and battery—Prior conviction not a defense when fraudulently obtained.*—A defendant, having committed an assault and

PRACTICE, CRIMINAL—(Continued.)

battery, procured himself to be arrested and fined a small amount. *Held*, that such conviction and fine was not a defense to a subsequent prosecution instituted by the injured party for the same offense. Such action was a mere fraud upon the criminal justice of the State, and cannot be allowed to succeed. —*State v. Cole*, 70.

4. *Practice, criminal — Perjury — Indictment for, must show what — Materiality of testimony.*—Every indictment must contain sufficient allegations to show upon its face that an offense was committed; and in charging perjury it is essential to show that the oath was taken in a material matter. Its materiality must appear from facts set forth in the pleading, and it is not sufficient simply to say that it was material to the issues, without advising the court what those issues were, or what questions arose under them, that it may be seen whether the testimony was material or not.—*State v. Holden*, 93.
5. *Criminal law — Larceny — Indictment — Absence for purpose of avoiding arrest, equivalent to fleeing from justice — Construction of statute.*—Under an indictment for larceny the jury were properly instructed that the time during which defendant was out of the State or away from his usual place of abode, for the purpose of avoiding arrest or prosecution, should not be included in the period limited by the statute for the prosecution. Under that law (*Wagn. Stat.* 1120, § 28) absence for the purpose of avoiding arrest would amount to a "fleeing from justice."—*State v. Washburn*, 240.
6. *Practice, criminal — Obtaining money under false pretenses, indictment for — Intent, allegation of, what sufficient — Question of intent for the jury.*—In an indictment under the statute (*Wagn. Stat.* 461, § 47) for obtaining money under false pretenses, it is not necessary to allege the intent of the accused to be to cheat, injure, or defraud any particular person. (*See Wagn. Stat.* 517, § 41.)
In such an action, the principal fact having been proved, the question of intent is one for the jury.—*State v. Scott*, 422.
7. *Practice, criminal — Venue — St. Louis county — City of St. Louis.*—In the trial of a criminal for an offense charged to have been committed in the county of St. Louis, if there is evidence to reasonably satisfy the jury that the crime was committed in the city of St. Louis, the venue will be sufficiently established.—*State v. Burns*, 438.
8. *Practice, criminal — Crime must be shown to be committed within the county — Question of venue for the jury.*—In criminal trials it must always appear that the offense of which the prisoner is convicted is within the jurisdiction of the court. But the question of venue is always a question of fact, and it may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the prisoner is indicted was committed in the county where he is tried, it is sufficient.—*Id.*
9. *Criminal law — Indictment — Selling liquor on Sunday — Form of proceeding — Waiver.*—On indictment for selling liquor on Sunday, defendant submitted himself to the jurisdiction of the court and allowed judgment to go against him by voluntary confession and consent. The court had undisputed jurisdiction of the subject-matter of the indictment. *Held*, that it was competent for defendant to waive an objection urged against the form of the proceeding—as that it was by indictment instead of civil action. And

PRACTICE, CRIMINAL—(Continued.)

- having waived it in the trial court he could not raise it for the first time in the Supreme Court.—*State v. Warnke*, 451.
10. *Criminal law—Indictment—Selling liquor on Sunday—Form of proceeding—Waiver.*—On trial of an indictment for selling liquor on Sunday, defendant, by allowing judgment to go against him by voluntary confession and consent, may waive an objection urged merely to the form of the proceeding—as that it was by indictment and not by civil action. And having waived it in the trial court he cannot raise it for the first time in the Supreme Court. (*State v. Warnke, ante*, p. 451, affirmed.)—*State v. Saxauer*, 454.
11. *Criminal law—Selling liquor on Sunday—Offense may be tried before the Circuit Court.*—Under section 32, page 516, Wagn. Stat., the offense of selling liquor on Sunday is not exclusively cognizable before justices of the peace, but may be tried before the Circuit Court.—*Id.*
12. *Criminal law—Misdemeanors—Disturbing public worship, indictable.*—The offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) being punishable by fine and imprisonment (*vide* same section), is an indictable one. The case is distinguishable from that of selling liquor on Sunday, which is punishable by fine only, and under Wagn. Stat. 516, § 29, amenable only to a civil action. (*State v. Huffschtmidt*, 47 Mo. 73.)—*State v. Carter*, 481.
13. *Disturbing public worship—Circuit Court has jurisdiction.*—Of the offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) the Circuit Court has jurisdiction. (Wagn. Stat. 516, § 32; *State v. Warnke, ante*, p. 451.)—*Id.*
14. *Criminal law—Uttering forged instrument, what constitutes.*—The offering of a forged instrument, with the representation by words or actions that the same is genuine, is an "uttering" within the meaning of the statute (Wagn. Stat. 471, § 21), whether the paper be accepted or not.
- Questions as to the uttering and the guilty knowledge on the part of the accused are for the jury to determine under the evidence.—*State v. Horner*, 520.
15. *Venue—Question of, one of fact—What proof touching sufficient.*—The question of venue is always one of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which a prisoner is indicted was committed in the county where he is tried, it is sufficient. (*State v. Burns, ante*, p. 438, affirmed.)—*Id.*
- See COUNTIES, 1.

PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court—Failure to make out appeal—Neglect of clerk.*—When it appears from the records that appellant has failed to prosecute his appeal within the time required by law, the judgment will, on motion, be affirmed, even though it further appear that the transcript was ordered in time, but that the clerk neglected to make it out. The respondent must not be made to suffer by reason of his failure.—*Redway v. Chapman*, 218.
2. *Practice, Supreme Court—Failure to file transcript—Damages.*—When appellant fails to prosecute his appeal as required by law, and respondent presents to this court a perfect transcript, judgment will, on motion, be affirmed. And when the appeal appears to be taken for delay, ten per cent. damages will be awarded.—*Rice v. McElhannon*, 224.

PRACTICE, SUPREME COURT—(Continued.)

3. *Practice, civil—Supreme Court—Chancery—Instructions.*—In purely chancery proceedings, instructions given or refused below are disregarded by the Supreme Court.—*Pixlee v. Osborn*, 313.
4. *Practice, civil—Supreme Court—Marginal marks no part of a record.*—Marks in the margin of a record, such as the words "given" or "refused," placed beside an instruction in the margin of a transcript, form no part of the record.—*Barbee v. Hereford*, 323.
5. *Practice, civil—Supreme Court may review judgment of Circuit Court rendered on motion, without motion for new trial.*—The Supreme Court may review the decisions of an inferior court rendered on motion—as on a motion to correct a sheriff's return—although no motion for new trial has been made.—*Meek v. Hewitt*, 337.
6. *Practice, civil—Supreme Court will not disturb verdict on questions of fact.*—In cases at law this court will not disturb the verdict of a jury where no legal questions have been raised.—*Blankenship v. North Missouri R.R. Co.*, 376.
7. *Bill of exceptions, what is not.*—A bill of exceptions which does not embody or set out the testimony, but only purports to state the substance of what was proved, is not properly a bill of exceptions at all.—*Id.*
8. *Practice, civil—Supreme Court—Bill of exceptions, refusal of court to sign—Affidavits filed in vacation, etc.*—A bill of exceptions left unsigned by the judge as being untrue and not signed by bystanders, but only accompanied by affidavits sworn to and filed in vacation, and that without any consent that the same should be filed out of time, is not such a bill of exceptions as the law (*Wagn. Stat.* 1043-4, §§ 28, 30, 32, 34) requires, and the affidavits will not be considered by the court.—*Id.*
9. *Practice, Supreme Court—Law points not saved and no bill of exceptions, judgment affirmed.*—Where no questions of law are raised, and no bill of exceptions is preserved, the judgment will be affirmed.—*Hedges v. North Missouri R.R. Co.*, 382.
10. *Practice, civil—Motion for new trial, assignment of objections in.*—The Supreme Court will not consider objections to the action of the lower court which were not assigned in motion for new trial.—*Cowen v. St. Louis & Iron Mountain R.R. Co.*, 556.
11. *Practice, Supreme Court—Error—Appeal.*—A case showing no writ of error or appeal will be dismissed.—*State v. Griggs*, 557.
12. *Practice, civil—Supreme Court—Res adjudicata.*—When a case has been decided by this court, and again comes here by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata* and no longer open to dispute.—*Grumley v. Webb* (per *Wagner, J.*, dissenting), 562.
13. *Practice, civil—Supreme Court—Stare decisis.*—Where, upon a second appeal to the Supreme Court, the two records are the same, the former finding should control, unless injustice to the rights of parties would be done by adhering to the first opinion.—*Id.* 559.

See PRACTICE, CIVIL—APPEALS; PRACTICE, CIVIL—TRIALS, 6; PRACTICE, CRIMINAL, 9, 10.

PRESUMPTIONS.

See EQUITY, 9; EVIDENCE.

PRINCIPAL AND AGENT.

See AGENCY.

PRISONERS.

See COUNTIES, 1.

PROHIBITION, WRIT OF.

See COURTS, COUNTY, 2.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROTEST.

See BILLS AND NOTES.

PUBLIC PRINTER.

1. *Public printer — Commissioners, duty of concerning accounts of public printer — Act of March 28, 1870.*—The act of the Legislature of Missouri, approved March 28, 1870 (Sess. Acts 1870, p. 79), entitled "An act to provide for the execution and supervision of the State printing and binding, and abolishing the office of public printer," must be construed as a whole; and the whole structure goes to show that the thirtieth section, which provided that the then State printer should do the State printing and binding until the first Monday in May, 1871, was an afterthought, and practically postponed the taking effect of the system of contracts and competition until May, 1871. The duties of the commissioners, as auditors, related to work let out by them and done under their superintendence, but not to work not done under their letting and direction. Hence they could not be required to audit the accounts of the public printer.—State ex rel. Wilcox v. Wiegel, 29.

Q**QUO WARRANTO.**

See OFFICERS, 2.

R**RAILROADS.**

1. *Pacific Railroad — County subscription — Ownership of stock.*—By the act incorporating the Pacific Railroad (Sess. Acts 1849, p. 222, § 14) the respective counties in which the railroad should be located were authorized to subscribe for the stock of the company and invest the funds of the county therein. The stock was to be held, owned and treated as county property, and the stock subscribed by each county belonged to and is owned by the county, unless its title has been divested by acts and transactions subsequent to the original subscription.—Ridings v. Hall, 100.
2. *Pacific Railroad — County subscriptions — Special taxes — Construction of statute.*—Section 30 of the act of February, 1853, authorizing the formation of railroad associations (Sess. Acts 1853, p. 121), has in view subscriptions made after the passage of said act—not subscriptions made prior thereto. Section 33 of that act, which authorizes the levy of a special tax to pay the interest on bonds theretofore issued, and provide a sinking fund to pay the principal, grants no stock rights to individual tax-payers. The stock subscribed prior to the passage of this act, under the authority of section 14 of the act of 184 (Sess. Acts 1849, p. 222), belonged to the county subscribing it and contracting to pay for it, notwithstanding it may

RAILROADS—(Continued.)

have been paid for by the proceeds of special taxes levied under section 33 of the act of 1853, above quoted.—*Id.*

3. *Corporations — Railroads — Line of track should be fenced through towns and cities, when.*—A railroad company is not excused from fencing the track of its road through a town or city merely because of its passage through such locality, without reference to the question whether it crosses the public highways of a town or city.—*Ells v. Pacific R.R. Co.*, 231.

4. *Corporations — Railroads — Damages for failure to fence, when plaintiff contracts with company to fence.*—One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground for action of damages for killing of stock, even though the statute makes it imperative on the company to fence.—*Id.*

5. *Railroad — Damages, action for before justice of peace — Averments in.*—In an action against a railroad company, under section 43, chapter 63, Gen. Stat. 1865, before a court of record, for damages to stock, it should appear among other things that the stock strayed on the road through defects of cattle-guards at a road-crossing, or in consequence of the absence of fences which the railroad company was bound to build. But in such action before a justice of the peace, the statement will be sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to make the judgment a bar to another suit, although it fail to set forth the averments above mentioned.—*Norton v. Hannibal & St. Jo. R.R. Co.*, 387.

6. *Railroad — Saline county railroad bonds issued without popular vote specifying the amount — Innocent holders protected.*—Under the act of January 22, 1861 (Sess. Acts 1860-1, p. 455), the County Court of Saline county could issue railroad bonds for the Lexington & St. Louis Railroad Company only upon popular vote "specifying the amount" to be issued. (45 Mo. 242.) And the company, being a direct party to the bonds, could enforce their payment only after such vote had been taken. But when the question of the issue of the bonds had been submitted to vote, and a majority had voted for the issue, and the bonds on their face showed a compliance with the act, and said bonds had been negotiated by the county in the construction of the road, purchasers would not be required to look further, and would be entitled to *mandamus* to enforce the payment of said bonds, even though the vote in fact failed to "specify the amount" as required by law.

The general rule is that where the statute gives authority to contract a debt on specified conditions, their performance is necessary to support the authority; and in a direct proceeding to prevent the consummation of the contract, the substantial performance of every radical condition may be insisted on. But when the contract is completed, and the rights of innocent third parties supervene, the rule is relaxed. And in such case, where an attempt has been made to comply with the condition specified, and the bond or other instrument indicates a compliance therewith, the innocent purchaser will be protected.—*State ex rel. Neal v. Saline County Court*, 390.

7. *Railroad companies — Damages, action for against — Negligence, when implied.*—In an action based upon the statute making railroad companies liable for all injury done to stock when their roads were not properly inclosed

RAILROADS—(Continued.)

with lawful fences (Wagn. Stat. 520, § 5), there is no necessity for alleging or proving negligence. The law in such cases implies negligence.—*Bigelow v. North Mo. R.R. Co.*, 510.

8. *Railroads—Fences, when must be erected by railroad companies building a road—When liable for damages.*—The reasonable construction of the statute relative to fencing lands adjoining railroads (Wagn. Stat. 310, § 43), is that it requires the corporations to have their fences built at least as soon as they commence running their roads; and, although, as a matter of law, it may not be that they are bound to erect fences before or while they are constructing their road through any particular landholder's premises, yet they must act with a prudent regard to the rights of others; and if lacking in this duty they are chargeable with negligence and must answer for the consequences. Thus they are bound while laying their road to use reasonable care to prevent the cattle of others from coming on the adjoining owner's fields and injuring him.—*Comings v. Hannibal & Central Mo. R.R. Co.*, 512.

9. *Railroads—Petition for damages—Allegation as to "road-bed"—Construction of statute—Demurrer—Double damages.*—In suit against a railroad company for damages to crops, caused by the failure of defendant to fence its line of road through plaintiff's premises, where it appeared from the petition that the company had constructed its "road-bed," but no allegation showed that the road was completed, *held*, that though the petition was not good as a pleading framed on the statute (Wagn. Stat. 310, § 43), it set forth a good cause of action at common law, and should be proceeded with. And as a common-law action it was not demurrable because it asked for a judgment for double damages. The character of a petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced in the issues.—*Id.*

10. *Corporations—Railroad—Dissolution—Act to foreclose the State's lien.*—A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its right.—*Moore v. Whitcomb*, 543.

11. *Corporations—Railroads—Cairo & Fulton Railroad, seizure and sale of.*—The seizure and sale of the Cairo & Fulton Railroad under the State lien extinguished the Cairo & Fulton Railroad Company, such seizure and sale destroying the objects for which the corporation was instituted. (Answers to questions, etc., 37 Mo. 135, cited and affirmed.)—*Id.*

12. *Damages—Railroad companies—Accident in towns—Public highway.*—Notwithstanding the provisions of article v of the act touching damages (Wagn. Stat. 520), the law will not presume the negligence of a railroad company from the killing of stock within the corporate limits of a town or city, especially when the accident happened at a crossing long used as a public highway. (See Wagn. Stat. ch. 37, art. II, § 43.)—*Wier v. St. Louis & Iron Mountain R.R. Co.*, 558.

See CONSTITUTION OF MISSOURI, 2.

RATIFICATION.

See CONTRACTS, 3.

RECORDS.

1. *Records, lost, ordinarily may be proved by parol evidence.*—Ordinarily, if a record be lost, its contents may be proved, like any other document, by secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence.—*Foult v. Colburn*, 225.

See LANDS AND LAND TITLES, 5.

REFEREE.

See PRACTICE, CIVIL—TRIALS, 4.

REGISTRATION.

1. *Registration, board of—Witnesses before, not entitled to fees.*—Persons summoned as witnesses before a board of registration held in a given county under the registration act of 1866 (Gen. Stat. 1865, pp. 908-9, §§ 20, 27), are not entitled to payment of witness fees from the county. Said sections authorize no such payment, and the county cannot be held liable therefor without some express statute to that effect. The registration officers cannot bind the county as its agents by their act in summoning the witnesses. They are not agents of the county, but of the State. The county is no party to the proceeding.—*Finney v. Sullivan County*, 850.

RES ADJUDICATA.

See JUDGMENTS, 1; PRACTICE, SUPREME COURT, 12, 13

RES GESTÆ.

See EVIDENCE, 1.

REVENUE.

1. *Revenue—Taxation, repeal of temporary rate of—Power of Legislature, etc.*—As a general proposition, there can be no doubt of the power of the Legislature to repeal a temporary rate of taxation and impose another and higher rate, or additional taxes, by virtue of the State sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power, upon a consideration deemed to be a part of the value of the grant or the charter.—*State, to use of Pacific R.R., v. Dulle*, 282.
2. *Revenue—Pacific Railroad liable for county taxes—Construction of statute.*—Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of State taxes, nevertheless, under the constitution (art. II, § 16) and the General Statutes (Wagn. Stat. 1159-61, §§ 1-9), the company was liable for its county taxes.—*Id.*
3. *Revenue—County collector a ministerial officer—Where assessor has jurisdiction, collector protected in making levy, etc.*—The office of county collector is a ministerial one, and where an action of trespass is brought against a county collector for levying upon and seizing property for unpaid taxes, if it appear that the assessor has jurisdiction over the property—i. e. that it is liable to taxation in any form—then the collector will be protected notwithstanding irregularities in the mode of assessment.—*Id.*
4. *Schools—Taxes—Laws in force in 1868 authorized school corporations to include as taxable merchants' statements.*—Under the laws in force in 1869 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7-9; see also *id.* 1246, § 18, and 1243, § 6), school corporations in towns and villages were authorized to

REVENUE—(Continued.)

include merchants' statements as taxable, and to collect school taxes upon such statements.—State ex rel. Kidder School District v. Kinney, 373.

5. *Injunction—County collector—Void levy—Trespass.*—A collector cannot be enjoined from enforcing the collection of a tax on a void levy. In such case the officer would be a mere trespasser, and the injured party would have an ample remedy at law.—McPike v. Pew, 525.
6. *Revenue—Tax deed—Printed notice of sale of delinquent lands required, when—Construction of statute.*—The putting up of written instead of printed notices of the sale of land for non-payment of taxes is not a sufficient compliance with the first clause of section 2, page 85, Adj. Sess. Acts 1863; and a tax deed which recites simply the posting of written advertisements is void and conveys no title. Advertisement in the time and manner prescribed by law is a prerequisite to the validity of a tax title, and this principle is not altered because judgment is required by law to be entered up in the County Court. The notice is the indispensable prerequisite, and without it the court has no jurisdiction in the premises.—Lagroue v. Rains, 536.

See RAILROADS, 1, 2.

ROADS, COUNTY.

See BONDS, COUNTY, 1, 2.

S**SALES.**

1. *Sales under military authority, validity of—Valid condemnation or military usage must be shown.*—The act of a public officer is not necessarily that of the government he represents, and it is only so when he follows the law. The government can only act through the law. When obeying the law, its agents properly represent it, and on the seizure and sale of property the law transfers the title. In order to protect the title under a sale by a provost marshal, under color of military authority, the claimant under such sale must show that the property was sold under some valid condemnation or judgment, or that its seizure and sale was authorized by the usages of war; otherwise the action of the provost marshal was a mere trespass.—Bowles v. Lewis, 32.
2. *Deed of trust—Sale, notice of—"Public place," what is.*—The setting up of notice of sale on the sides of a public square in a town or city satisfies the requirement contained in a deed of trust, that the notice should be put up in a "public place" in such town or city.
The recitals by the trustee in his deed, that he put up the notices in "public places," are sufficient *prima facie* evidence of that fact.—Carter v. Abshire, 300.
3. *Deed of trust, sale under—When land should be sold in lump, when in parcels.*—When property for sale under a deed of trust will bring more by being sold in separate subdivisions, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. But he must sell it in the lump or in parcels, according as will be most beneficial for the debtor; and he will be held to a strict accountability for the exercise of the discretion devolved upon him.—*Id.*
4. *Fraud—Sale of land—Mere inadequacy of consideration not sufficient to charge fraud.*—Mere inadequacy of consideration in the sale of property, of

SALES—(Continued.)

itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for the interference of equity.—*Id.*

See **COURTS, PROBATE; EXECUTIONS, 5; LANDS AND LAND TITLES, 8; MORTGAGES AND DEEDS OF TRUST, 7, 8; SHERIFFS' SALES.**

SALINE COUNTY.

See **RAILROADS, 6.**

SCHOOLS.

1. *Eminent domain—Appropriation of property for local schools constitutional.*—An appropriation of property for the use of a local school (see Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327, 328, §§ 3, 4) is an appropriation of it to a public use, within the meaning of section 16, article I, of the State constitution.—*Township Board of Education v. Hackmann*, 243.

2. *Schools—Taxes—Laws in force in 1868 authorized school corporations to include as taxable merchants' statements.*—Under the laws in force in 1869 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7-9; see also *id.* 1246, § 18, and 1243, § 6), school corporations in towns and villages were authorized to include merchants' statements as taxable, and to collect school taxes upon such statements.—*State ex rel. Kidder School District v. Kinney*, 373.

SECRETARY OF STATE.

1. *Secretary of State—Action against, under statute—Plaintiff need not be legally qualified.*—The plaintiff in an action against the Secretary of State for failure or refusal to open returns and cast up votes, if the suit be brought on his general official bond, must first show himself entitled to the office. But under the statute relating to that officer (Wagn. Stat. 1272, § 15), the plaintiff may properly sue, although not lawfully elected. Within the meaning of that section he may be "aggrieved" by such failure or refusal, whether elected or not. The object of that provision is not to compensate a sufferer for the loss of office; but the liability which it imposes is in the nature of a penalty for misfeasance, of which the officer may be guilty, by reason of failure to canvass votes, although the party aggrieved received a minority of votes.—*Switzler v. Rodman*, 197.

SHERIFF.

See **SURETIES, 4; SHERIFFS' SALES.**

SHERIFFS' SALES.

1. *Conveyances—Sheriff's deed—Amended deed should be made, when—Effect of amendment on former deed—Innocent purchasers, who are.*—It is the right and duty of a sheriff to amend a defective deed when the facts will warrant him in so doing, and the amended deed will relate back to the date of the original one.

In such case the former deed may be first set aside on motion. But the last and correct deed is not void because the imperfect deed was not first set aside.

A purchaser of the land between the date of the first and second deeds will be affected by the latter only where he had either actual notice of the facts therein recited, or notice of such recorded proceedings as would advise him of them.

Where A. purchased at sheriff's sale and went into open, notorious possession of the premises, of which fact B. was aware, but, learning that the title

SHERIFFS' SALES—(Continued.)

- was defective by reason of infirmities in the sheriff's deed, proceeded to bid off the property under another judgment for a nominal sum, to say that B., in such a case, was a stranger, and should be protected as an innocent purchaser from the operation of a second and amended sheriff's deed to A., would confound all ideas as to what constitutes innocence either in an actual or moral sense.—*Thornton v. Miskimmon*, 219.
2. *Sheriff, deed of land by—Omission in to state the date of levy under the attachment—Failure of date may be supplied by parol evidence.*—In a suit for certain real estate, carried on between two purchasers under different attachment sales, to test the priority of their claims, it appeared that the sheriff's deed to defendant failed to set forth the date of the attachment and levy; that, without defendant's fault, a portion of the original files in the suit had been lost, but that enough of the record remained to advise plaintiff that there had been a writ of attachment and levy. *Held*, that the sheriff's deed was not vitiated by the failure to recite the original levy; that proof of the date of the levy might be made by parol evidence; and that, on such proof, the deed would relate back to the time of the levy.—*Foult v. Colburn*, 225.
 3. *Conveyances—Sheriff's deed, defective acknowledgment of—Not aided by record.*—The record of a certificate of acknowledgment to a sheriff's deed, made by the clerk of a Circuit Court (Wagn. Stat. 612 § 56), is inadmissible to sustain an original acknowledgment thereof, where the latter was defective.—*Samuels v. Shelton*, 444.
 4. *Conveyances—Acknowledgment—Clerical error.*—A certificate of acknowledgment indorsed on the back of a sheriff's deed is not invalid because it recited that "he appeared in court and acknowledged that he executed and delivered a deed for the uses," etc., and did not specifically refer to the deed acknowledged. No material or necessary part of the certificate was omitted, and the intention was sufficiently clear on the face of the paper.—*Id.*
 5. *Conveyances—Seal—Scrawl sufficient.*—In a sheriff's deed, a scrawl appended to his name, with the word "seal" written therein, is, under the laws of this State, a sufficient seal.—*Id.*
 6. *Sheriff's deed prima facie evidence of the truth of its recitals.*—Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are *prima facie* evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts. But the recitals may be invalidated or destroyed by the party resisting the deed.—*Id.*
 7. *Conveyance—Acknowledgment of by deputy, sheriff in his own name invalid.*—An acknowledgment to a deed, of land sold under execution, made by a deputy sheriff in his own name, is invalid.—*Id.*

SLANDER.

2. *Slander—Words imputing immoral or indictable offense actionable in themselves.*—Words imputing the commission of an immoral and indictable offense are actionable in themselves; and in such case the law will infer malice, and there is no necessity of proving it.—*Barbee v. Hereford*, 323

See LIBEL.

SPECIAL LEGISLATION.

See CONSTITUTION OF MISSOURI, 1.

SPECIFIC PERFORMANCE.

See CONTRACTS, 7.

ST. LOUIS, CITY OF.

1. *St. Louis, city of—Ordinances concerning contracts for lighting, etc., the street lamps, how construed.*—Section 1, article VI (p. 342), of the Revised Ordinances of the city of St. Louis (Revision of 1866), which provides that "The city engineer is hereby authorized to contract in the same manner as for other city work, for the cleaning, lighting and repairing of the public street lamps," refers back to section 5, article I, of ordinance 5399 (Revision of 1866, p. 320), which provides that "all public works ordered by the city, unless otherwise directed, shall be let by the city engineer to the lowest and best bidder," and provides the modes of advertising, making specifications and receiving bids. And a contract made without compliance with these provisions is invalid.—State ex rel. Dunn v. Barlow, 17.
2. *St. Louis, city of—Ordinance concerning contracts for lighting street lamps, how affected by amended charter.*—The amended charter of the city of St. Louis, adopted March 4, 1870, provides by law for the mode of letting public work. Section 17, article VIII, of said charter forbids the city council from making contracts directly for public work, etc., and directs the city engineer to prepare plans, profiles and estimates, and, under the direction of ordinances, to advertise for bids and let the work by contract to the lowest and best bidder. After the adoption of this charter, the provisions of the ordinance requiring the engineer to contract for lighting the public street lamps in the same manner as for other city work, although adopted before the passage of the amended charter, can have reference only to the mode provided in such amended charter.—*Id.*

See PRACTICE, CRIMINAL, 7, 8.

STATUTE, CONSTRUCTION OF.

- ADMINISTRATION, 2 (Wagn. Stat. 77, § 47).
 ATTACHMENT, 3 (R. S. 1825, p. 144).
 BONDS, COUNTY, 2 (Sess. Acts 1865, p. 120, § 13)
 COUNTIES, 1 (Wagn. Stat. 787, §§ 19, 20).
 COURTS, COUNTY, 1 (Wagn. Stat. 439, §§ 1, 2)
 DEDICATION TO PUBLIC USE, 1 (Wagn. Stat. 1328, § 8; *id.* 1315, § 7).
 DOWER, 1 (Wagn. Stat. 542, § 21).
 EMINENT DOMAIN, 1 (Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327-8, §§ 3, 4; Const. of Mo., art. I, § 16).
 GARNISHMENT, 1 (Wagn. Stat. 664, § 37).
 HUSBAND AND WIFE, 6 (Wagn. Stat. 935, § 14; R. C. 1855, p. 754).
 JEOPAILS, 1 (Wagn. Stat. 1036, § 19).
 JUDGMENTS, 4 (Wagn. Stat. 420, § 15)
 LANDLORD AND TENANT, 1 (Wagn. Stat. 882, § 33).
 MANDAMUS, 1 (Wagn. Stat. 849, § 10).
 MECHANICS' LIEN, 1 (R. C. 1855, p. 1068, § 7).
 MORTGAGES AND DEEDS OF TRUST, 10 (Wagn. Stat. 955, § 10).
 PACIFIC RAILROAD, 1 (Sess. Acts 1851, p. 271, § 6; Sess. Acts 1853, p. 18, § 12; Wagn. Stat. 1159-61, §§ 1-9).

STATUTE, CONSTRUCTION OF—(Continued.)

- PARTITION, 1 (Wagn. Stat. 967, § 8).
- PENITENTIARY, 1 (Wagn. Stat. 983-5, §§ 2, 5, 6, 15, 17).
- PETTIS COUNTY WARRANTS, 1 (Sess. Acts 1868, p. 42).
- PRACTICE, CIVIL, 1 (Wagn. Stat. 1036, § 19).
- PRACTICE, CIVIL—APPEAL, 3 (Wagn. Stat. 1059, § 11).
- PRACTICE, CRIMINAL, 2 (Wagn. Stat. 1336, § 24; Sess. Acts 1870, p. 29), 5 (Wagn. Stat. 1120, § 28), 11 (Wagn. Stat. 516, § 32), 12, 13 (Wagn. Stat. 504, § 30), 13 (Wagn. Stat. 516, § 32).
- PRACTICE, SUPREME COURT, 8 (Wagn. Stat. 1043-4, §§ 28, 30, 32, 34).
- PUBLIC PRINTER, 1 (Sess. Acts 1870, p. 79).
- RAILROADS, 1, 2 (Sess. Acts 1849, p. 222, § 14), 2 (Sess. Acts 1853, p. 121, § 30), 5 (Gen. Stat. 1865, ch. 63, § 43), 6 (Sess. Acts 1861, p. 455), 7 (Wagn. Stat. 520, § 5), 8, 9 (Wagn. Stat. 310, § 43).
- REGISTRATION, 1 (Gen. Stat. 1865, pp. 908-9, §§ 20, 27).
- REVENUE, 6 (Adj. Sess. Acts 1863, p. 85, § 2).
- SCHOOLS, 2 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7, 9; *id.* 1243, § 18; *id.* 1246, § 18).
- SECRETARY OF STATE, 1 (Wagn. Stat. 1272, § 15).
- SHERIFFS' SALES, 3 (Wagn. Stat. 612, § 56).
- SURETIES, 5 (Wagn. Stat. 1302, § 1).
- SWAMP LANDS, 1 (Sess. Stat. 1869, p. 66), 2 (Gen. Stat. 1865, ch. 46, § 81; Wagn. Stat. 1259, § 79).
- USURY, 1 (Adj. Sess. Acts 1855, p. 149, § 3).
- WILLS, 4 (Wagn. Stat. 93, § 1), 5 (Wagn. Stat. 1385, § 9), 6 (Wagn. Stat. 1368, § 29), 7 (Wagn. Stat. 1372-3, §§ 1-5).

STOCK.

See CORPORATIONS, 4; RAILROADS, 1, 2, 7, 8.

STREETS AND ALLEYS.

See DEDICATION TO PUBLIC USE.

STREET LAMPS.

See ST. LOUIS, CITY OF, 1, 2.

SUNDAY.

See BILLS AND NOTES, 4; PRACTICE, CRIMINAL, 9, 10, 11, 12.

SURETIES.

1. *Corporations, officers of—Loan by, of money of the corporation without authority—Responsibility of sureties.*—When an officer of a corporation loans money of the corporation without authority, and has failed to account for it, his sureties are liable thereupon, whether the persons to whom he loaned it are solvent or not.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Corporations, powers of—Liability of agents—Sureties.*—A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power; and therefore a surety for one as agent for a corporation is limited to such acts as the corporation is authorized to require of its agents. But where the corporation grants powers "to buy, exchange, sell, mortgage, transfer, or otherwise use its property," under these powers it might legally loan out its surplus funds, and the right to accept security for

**SURETIES—(Continued.)**

such loan follows as a necessary incident; and where gold was deposited with a corporation as collateral security for a loan, the title thereto vested lawfully in the corporation; and where an agent of the corporation converted such gold to his own use, his sureties are liable therefor.—*Id.*

3. *Corporations—Officers, bonds of—Variation in style of office.*—Where an official bond of an officer of a corporation was given for the faithful performance of his duties as treasurer, and the charter designates the officer as "secretary, who shall act as treasurer," *held*, that the sureties on its bond were liable for defalcations which occurred while he was acting as treasurer.—*Id.*
4. *Sureties—Note—Payment of by principal—Subrogation.*—The sureties of a sheriff who were compelled to pay over to certain heirs the amount due them by him on the sale of the lands in partition, may be joined with the sheriff's administrator as plaintiffs in suit on the note given for the purchase of the land. Having under compulsion paid the beneficiaries of the note the sum due them, the sureties were entitled to succeed to their rights, and payment of the amount due should be made to the sureties.—*Sweet, Adm'r of Jones, v. Jeffries, 279.*
5. *Surety—Notice by to sue, when not in writing, is no protection to.*—Notice by a surety on a note to the holder thereof to sue, when not in writing, is not binding upon the holder, either under the statute (Gen. Stat. 1865, p. 406, § 1; Wagn. Stat. 1902, § 1) or at common law; and his neglect to comply with such notice will not release the surety.—*Langdon v. Markle, 357.*

SURVIVORSHIP.

See **HUSBAND AND WIFE, 1.**

SWAMP LANDS.

1. *Swamp lands—Register of lands, duty of, as to the issue of patents of swamp lands to counties.*—The act of March 10, 1869 (Sess. Acts 1869, p. 66), entitled "An act in relation to swamp and overflowed lands," which directs the register of lands to prepare a patent or patents embracing all the swamp and overflowed lands lying within the limits of the several counties of the State, conveying thereby all the title of the State of Missouri in such lands to the counties in which such lands may lie, does not empower that officer to issue to one county patents of lands lying in another. It confers upon him no authority to take jurisdiction of and adjudicate on the rights of rival claimants. He must look at the county lines as they existed at the date of the passage of the act, and be guided by them in the issue of patents to the respective counties.—*State ex rel. Ripley County v. Register of Lands, 59.*
2. *County Court, clerk of—Swamp lands—Stray act—Construction of statute.*—Notwithstanding the provisions of section 81, ch. 46, Gen. Stat. 1865, and Wagn. Stat. 1259, § 79, it is not the duty of the clerk of a County Court to collect the proceeds arising from the sale of swamp lands, or of "section 16," or moneys received under the stray act, and the sureties on his official bond cannot be held for the amount of moneys so collected by him, and not paid over as required by law.

A proper interpretation of section 81 does not authorize the county clerk to receive the money, but imposes upon him, as the keeper of the public accounts and the custodian of the evidences of indebtedness, to see that collections are enforced.—*State v. Modler, 331.*

SWAMP LANDS—(Continued.)

3. *Mandamus will issue against county judges for payment of warrants drawn on swamp land fund.*—In proceedings before the Circuit Court for *mandamus* against the judges of the County Court, requiring payment of warrants ordered by them and drawn on the "swamp land" fund, where the return sets up no equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the writ will issue; and it cannot be objected that no judgment had been first obtained against the County Court on the claim evidenced by the warrants; for being drawn on a special fund, such judgment could not be obtained.

Were the proceedings appealable to the Circuit Court, *mandamus* would not lie; since that remedy is afforded only when others fail. But being an attempt to induce the payment of claims already audited, there was nothing in regard to which an appeal would lie.—*State ex rel. Zimmerman v. Bollinger County Court*, 475.

T

TAX.

See REVENUE.

TRANSCRIPT.

See PRACTICE, SUPREME COURT, 1, 2, 4.

TRESPASS.

1. *Trespass—Damage quare clausum fregit—Domestic stock—Allegations as to scienter.*—The doctrine is well settled that where an action of trespass or case is brought for mischief done the person or personal property of another by animals *mansuetæ naturæ*, such as horses, cattle, sheep and swine, the petition must show that the owner had notice of their viciousness before he can be charged for the mischief done, because such animals are not by nature fierce or dangerous. But an action of trespass done by such stock, by breaking and entering the close of another, need not allege that defendant knew of the propensity in them to wander and roam about, which would naturally produce such damage, because animals of that description are by nature notoriously prone to such habits, and defendant will be presumed to have known them. And any mischief done by them, after entering the close, may be alleged and recovered upon as aggravation.—*Beckett v. Beckett*, 396.

See REVENUE, 5.

TRUSTS.

See CONTRACTS, 5; MORTGAGES AND DEEDS OF TRUST.

U

UNLAWFUL DETAINER.

1. *Unlawful detainer—Worm fence partly resting on land of adjoining proprietor, etc.*—Where one erects a worm or Virginia fence to separate his land from that of an adjoining owner, half of the width of the fence may rest upon the land of the latter, the fence being of suitable dimensions; and unlawful detainer will not lie against the builder for the land so occupied beyond the dividing line.—*Pettigrew v. Lancy*, 380.

USES.

See TRUSTS.

USURY.

1. *Interest — Usury — Loans — Purchaser of commercial paper — Boatmen's Savings Institution.*— Under the charter of the Boatmen's Savings Institution of St. Louis (Adj. Sess. Acts 1855, p. 149, § 3), the discounting of commercial paper by the bank constituted a loan, and discount at the rate of over eight per cent. reserved would amount to usury. But the bank might purchase bills of exchange at whatever rates might be agreed on between itself and its customers. Usury has no application to such transactions. To constitute usury there must be an express or implied loan. And an allegation that the bank simply purchased bills at figures exceeding the current rates of exchange, with a view to evading the charter restrictions as to interest, would be held on demurrer insufficient to charge usury.— *State ex rel. Attorney General v. The Boatmen's Savings Institution*, 186.

W

WAGES.

See GARNISHMENT, 1.

WARRANTS, COUNTY.

See PETTIS COUNTY WARRANTS.

WILLS.

1. *Wills, proceedings to test validity of — Transfer from Probate to Circuit Court.*— Proceedings to test the validity of a purported will are originally within the jurisdiction of the Probate Court where the will was originally probated and ordered to record. Such proceedings are *in rem*, operating directly upon the will—the *res*; and a transfer of the case to the Circuit Court does not change its character or the character of its subject-matter, and the jurisdiction of the Circuit Court, upon such transference, not being original, is derivative in effect, as on appeal; and after such transference the proceedings could not be dismissed by the contestants without prejudice to them—that is, without an affirmance of the prior judgment.— *Benoist v. Murrin*, 48.
2. *Wills, proceedings to contest — Contestants not allowed to dismiss without prejudice.*— It has been repeatedly held that in proceedings to establish a will, those in the affirmative cannot take a nonsuit, and that it is the right of the contestant to insist upon a verdict. If the contestants in that case insist on the proceedings going forward to a verdict, certainly those upon whom is thrown the burden of establishing an instrument assailed and drawn in question by the action of the contestants, ought to have the same privilege.— *Id.*
3. *Wills, proof of — Probate Court, judgment of, how impeached.*— The judgment of a court probating a will is like the judgment of any other court of competent jurisdiction, and cannot be impeached collaterally. It matters not that the court erred, or that the evidence upon which it was founded was not sufficient to justify it. That would simply constitute an error in the proceedings of the court rendering it. But the judgment would be valid until reversed, annulled, or set aside in the proper manner. The evidence is no part of the judgment, and whether it was rendered upon sufficient or legal evidence can only be inquired into by a direct proceeding. The evidence

WILLS—(Continued.)

does not confer jurisdiction upon the court; it is merely the means by which the conclusion is arrived at.—*Dilworth v. Rice*, 124.

4. *Wills—Powers—Execution, by administrator with will annexed, of power not executed by the executor in whom it was vested by the will.*—Under section 1, article III, chapter 2, Wagn. Stat. 93, an administrator with the will annexed can legally and effectively execute a power of sale of lands which was vested by the testator in the executor named in the will, when such executor has died without executing the power, and when the will absolutely directs that the lands shall be sold, and no confidence or trust is reposed specially in the executor named, although the power may be accompanied by and involve the exercise of a discretion.—*Id.*
5. *Wills—Descents and distribution—Heir not mentioned in will takes, when.*—In order to prevent an heir not provided for in a will from taking his distributive share, under section 9 of the statute concerning wills (Wagn. Stat. 1385), the will must show on its face that the testator remembered him. He need not be directly named in the will, but it must contain provisions or language that point directly to him. Thus it cannot be inferred that, because the testator provided for the payment of debts due two of his children, he intended to disinherit the rest.—*Pounds v. Dale*, 270.
6. *Will, suit to contest validity of—Issues framed—Construction of statute—Burden of proof on whom.*—In a proceeding under the statute to contest the validity of a will, it is error for the court to refuse, on motion of counsel, to frame an issue for the jury as to whether or not the writing produced was the will of the testator. (Wagn. Stat. 1368, § 29.)
In such a suit the *onus* is on the defendants who seek to establish its validity, and they are entitled to open and close.—*Tingley v. Cowgill*, 291.
7. *Will, suit to contest validity of—Wife may testify in.*—In an action to contest the validity of a will, the wife is not precluded from testifying by reason of anything contained in the statute concerning witnesses (Wagn. Stat. 1372-3, §§ 1-5). That act contemplates cases where the husband is the real party in interest; whereas, in the case supposed, the wife is the real and the husband merely a nominal party.—*Id.*
8. *Wills—Undue influence—Bad treatment of children, proof touching.*—Mere bad treatment of children, exerted or exercised by the wife many years previous to the making of a will, although coupled with their disinheritance by the testator, does not necessarily furnish a reason for impeaching its validity. It should be followed up by proof showing that undue influence was acquired by her in consequence, and that the influence continued down to the time when the will was executed.—*Id.*
9. *Will, suit to invalidate—Testator, declarations of.*—In an action to contest the validity of a will, declarations of the testator made before the date of the will are inadmissible. (*Gibson v. Gibson*, 24 Mo. 227.)—*Id.*

WITNESSES.

See EVIDENCE; REGISTRATION, 1.